Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEFINA C. VILLA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the mandatory minimum sentence in 18 U.S.C. § 924(c)(1)(A)(i) apply to a defendant convicted of a gun crime when the defendant is also convicted of a transactionally related offense that triggers imposition of a higher mandatory minimum sentence? (Because this issue was resolved adversely to petitioner in the Tenth Circuit, and because this Court has granted certiorari on this issue in *Abbott v. United States*, No. 09-479 and *Gould v. United States*, No. 09-7073, should the instant case be held for a possible grant, vacate and remand ("GVR") disposition pending plenary review in *Abbott* and *Gould*?)

2. Is the Fourth Amendment violated when a police officer prolongs a routine traffic stop in order to conduct suspicionless investigations and inquiries regarding matters unrelated to the traffic stop?

LIST OF PARTIES

Petitioner, Josefina C. Villa, is represented by Victor S. Haltom, Esq., of Sacramento, California.

Respondent, the United States of America, is represented by Assistant United States Attorney David A. Kubichek, of Casper, Wyoming.

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Josefina C. Villa, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1-22, is reported at *United States v. Villa*, 589 F.3d 1334 (CA10 2009).

JURISDICTION

The judgment of the court of appeals was filed on December 29, 2009. On March 15, 2010, Justice Sotomayor extended the time for the filing of this petition until May 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

18 U.S.C. § 924(c)(1)(A)(i) provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years[.]

21 U.S.C. § 841(a)(1) provides:

> Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

21 U.S.C. § 841(b)(1)(A)(viii) provides, in pertinent part:

> Except as otherwise provided in section 409, 418, 419, or 420 [21 U.S.C. § 849, 859, 860,

> or 861], any person who violates subsection (a) of this section shall be sentenced as follows: . . . In the case of a violation of subsection (a) of this section involving . . . 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years. . . .

STATEMENT

This case presents questions concerning two subjects on which the circuit courts are divided. The first question is whether a mandatory minimum term of imprisonment may be imposed upon a defendant pursuant to 18 U.S.C. § 924(c)(1)(A) if the defendant is sentenced to a lengthier mandatory minimum term for a transactionally related offense. The second question is whether a police officer may prolong a routine traffic stop in order to conduct inquiries and investigations unrelated to the traffic stop.

Pursuant to this Court's Rule 10(a), review on certiorari is warranted in order to resolve the circuit splits on both questions.

As to the first question, the Second Circuit has held the "except" clause of 18 U.S.C. § 924(c)(1)(A) precludes imposition of a mandatory minimum

sentence for specified gun crimes in cases where convictions on transactionally related counts carry greater mandatory minimum sentences. *United States v. Williams*, 558 F.3d 166, 168-175 (CA2 2009), *pet. for cert. filed*, No. 09-466 (Oct. 20, 2009). The majority of circuit courts, however, have held consecutive mandatory minimum terms must be imposed in such circumstances. *United States v. Segarra*, 582 F.3d 1269, 1272-1273 (CA11 2009), *pet. for cert. filed*, No. 09-8536 (Jan. 8, 2010); *United States v. London*, 568 F.3d 553, 564 (CA5 2009), *pet. for cert. filed*, No. 09-5844 (Aug. 11, 2009); *United States v. Easter*, 553 F.3d 519, 524-527 (CA7 2009) (*per curiam*), *pet. for cert. filed sub nom. McSwain v. United States*, No. 08-9560 (Mar. 26, 2009); *United States v. Parker*, 549 F.3d 5, 10-12 (CA1 2008), *cert. denied*, 129 S.Ct. 1688 (2009); *United States v. Alaniz*, 235 F.3d 386 (CA8 2000), *cert. denied*, 533 U.S. 911 (2001). In the instant case, the Tenth Circuit joined with this majority and held Ms. Villa's convictions for one count of drug trafficking and one count of firearm possession in furtherance of the drug trafficking offense required imposition of consecutive mandatory minimum terms for both convictions – ten years for the drug crime and five years for the gun crime. App. 14-21. In so holding, the Tenth Circuit affirmed the 15-year aggregate sentence imposed upon Ms. Villa by the district court. App. 14, 24. The district court had felt constrained by the majority rule to impose that sentence. However, in imposing that sentence, the district court expressed its view that the sentence was unjust and excessive. The district court stated a ten-year

sentence would have been sufficient App. 45, 55. Had the district court adopted the Second Circuit's interpretation of the "except" clause in 18 U.S.C. § 924(c)(1)(A), the court would have imposed a ten-year sentence. Review on certiorari is warranted to resolve this circuit split.

As to the second question, the Eleventh Circuit applies a bright-line rule prohibiting any suspicionless investigation that prolongs a traffic stop. *United States v. Perkins*, 348 F.3d 965, 971 (CA11 2003); *United States v. Pruitt*, 174 F.3d 1215, 1219 (CA11 1999). Other circuit courts, however, have sanctioned suspicionless investigations resulting in brief extensions of the duration of traffic stops. *United States v. Everett*, 601 F.3d 484, 492 (CA6 2010); *United States v. Turvin*, 517 F.3d 1097, 1099-1104 (CA9 2008); *United States v. Childs*, 277 F.3d 947, 952-954 (CA7 2002) (*en banc*), *cert. denied*, 537 U.S. 829 (2002). In the instant case, the Tenth Circuit upheld a suspicionless prolongation of Ms. Villa's traffic stop – a delay that involved waiting for more than ten minutes for a drug detection dog to arrive. App. 5-11. Such suspicionless traffic stops are not authorized by this Court's traffic stop jurisprudence. Rather, the Eleventh Circuit's bright-line rule prohibiting suspicionless prolongation of traffic stops is consistent with this Court's decisions. Review on certiorari is warranted in order to resolve this circuit split.

A. Basis for Jurisdiction in the Lower Courts

This is a federal criminal case. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

B. Factual Background

1. Facts Germane to the Issue Concerning the "Except" Clause in 18 U.S.C. § 924(c)(1)(A)

Tried by jury, Ms. Villa was convicted of possessing 500 or more grams of a mixture or substance containing methamphetamine with intent to distribute (and aiding and abetting) in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A)(viii) and 18 U.S.C. § 2, and possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). App. 2. For the methamphetamine conviction, the district court sentenced Ms. Villa to the ten-year mandatory minimum term of imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A). App. 14. Over, Ms. Villa's objection, App. 35-39, 43-44, the district court imposed a consecutive five-year term for the firearm offense pursuant to 18 U.S.C. § 924(c)(1)(A)(i). App. 14, 24, 44-49, 56, 60. Thus, she was sentenced to an aggregate term of imprisonment for 15 years. App. 24.

Although the district court felt constrained, by its interpretation of 18 U.S.C. § 924(c)(1)(A), to impose a consecutive five-year term for Ms. Villa's conviction

under that section, the court expressed sharp disapproval of the aggregate sentence it believed it was bound to impose upon Ms. Villa:

> This Court has long expressed its hostility to mandatory gun sentences under 924(c) that ratchet up the level of punishment for people such as drug offenders who are subject to mandatory minimum sentences for the predicate offense without regard to factors that Congress has instructed judges to take into account under [§] 3553, Title 18. [¶] And after 14½ years of sentencing people, the Court has come to the conclusion that mandatory minimum sentences are antithetical to the whole concept of a sound sentencing policy; that it is rife with politics and, in many instances, yields unjust results. [¶] For example, in this case a sentence of ten years would be sufficient but not greater than necessary to meet the purposes of sentencing established by Congress, but that will not be the result achieved here. [¶] However disdainful this Court may be of the way that 924(c) is used to ratchet up the level of punishment, the fact remains that Congress' decision to do so reflects a legitimate albeit, in my view, an imprudent exercise of its authority.

App. 44-45.

Immediately before the district court pronounced Ms. Villa's 15-year sentence, the court stated: "[T]he consequences of your deeds have an impact far greater than I think is necessary." App. 55.

2. Facts Germane to the Fourth Amendment Issue

This case stems from a traffic stop and vehicle search on December 6, 2006. On that date, Trooper McKay of the Wyoming Highway Patrol stopped Ms. Villa on a highway in Wyoming. App. 2. During the course of events that unfolded following the traffic stop, the trooper discovered methamphetamine in the vehicle Ms. Villa had been driving. App. 4. The trooper videotaped the traffic stop, and a DVD containing the video was submitted in evidence in the district court. App. 64.

a. Evidence Developed During the Hearing on Ms. Villa's Motion to Suppress

"Prior to trial, Ms. Villa moved to suppress evidence seized as a result of the traffic stop and subsequent search. The district court denied the motion. . . ." App. 5. The following evidence was developed at the hearing on the motion to suppress:

1) Traffic Stop

On the morning of December 6, 2006, Ms. Villa was driving a vehicle on a highway near Cheyenne, Wyoming. Angela Davis was in the vehicle with Ms. Villa. Trooper McKay stopped Ms. Villa for speeding. App. 2. Ms. Villa had been traveling 79 miles per hour on a stretch of highway with a posted speed limit of 75 miles per hour. App. 65, 74-75.

2) Initial Observations and Questioning Unrelated to the Traffic Stop

Trooper McKay approached the vehicle on the passenger side at approximately 7:46 a.m. App. 76. The trooper was armed and in uniform. App. 8. He asked the ladies where they were heading. They said they were on their way to Minnesota to visit family. App. 2-3. The trooper observed two cell phones on the front console and two duffel bags in the back seat. To the trooper, Ms. Villa seemed nervous and Ms. Davis seemed "overly friendly." App. 3.

3) Clear License and Registration

Ms. Villa provided the trooper with her driver's license, registration, and insurance documentation. Ms. Villa's license was a California driver's license. The car had been registered and insured in Nevada two weeks earlier. The trooper took the documents furnished by Ms. Villa back to his patrol vehicle and ran the documented information through dispatch. The "information came back clear." App. 3.

4) Escalation of Investigation Unrelated to Traffic Stop

Trooper McKay returned to Ms. Villa's vehicle and asked her to come to his patrol vehicle to answer some questions. Ms. Villa did so. In the trooper's vehicle, the trooper began filling out a "warning ticket" and asked Ms. Villa where she lived. She said

she lived in California. She explained that the car was registered in Nevada because that is where her boyfriend lived. The trooper then questioned her further about her destination. She said that she and Ms. Davis were headed to Minnesota to visit Ms. Davis' family. The trooper asked Ms. Davis what city in Minnesota they were heading to. Ms. Villa said she did not know the specific city. App. 3.

5) Free to Go

"Trooper McKay finished writing the ticket, returned Ms. Villa's license, registration, and insurance information to her, and told her she was free to go." App. 3.

6) Further Questioning Unrelated to Traffic Stop

As Ms. Villa was exiting the patrol vehicle, the trooper said he wanted to ask her additional questions. Ms. Villa remained in the vehicle. App. 3-4. He asked her yet again where in Minnesota she and Ms. Davis were going. Ms. Villa again said she did not know and added that they were only planning on staying there two days. The trooper commented that they were making a long trip for only a two-day visit. Ms. Villa said she may fly back home after the visit. The trooper then told Ms. Villa to stay in his vehicle "while he returned to Ms. Villa's car to question Ms. Davis [further] about their travel plans."

However, Ms. Villa followed the trooper back to her car. App. 4.[1]

When Trooper McKay questioned Ms. Davis once again about her destination, she stated "that she was going to Minnesota to visit family for a short time, and that she, too, might fly back." Ms. Davis indicated that she and Ms. Villa were related. App. 4. The trooper's questioning of Ms. Davis concluded at approximately 7:53 a.m. App. 78.

7) Consent to Search Declined

The trooper then asked Ms. Villa if she would consent to him searching her vehicle. She declined. App. 4.

8) Prolongation of the Detention

The trooper detained Ms. Villa and Ms. Davis until a canine unit arrived. App. 4. The canine unit arrived at approximately 8:06 a.m. App. 4, 79.

9) Search and Seizure

The dog alerted to the presence of drugs in the vehicle. In a subsequent search, officers found two packages of methamphetamine under a panel in Ms.

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[1] In the district court, the government conceded Ms. Villa was detained at this point. App. 78. And, the Tenth Circuit found Ms. Villa was detained at this point. App. 4.

Villa's vehicle. App. 4. Approximately two months later, Trooper McKay found a handgun hidden in the back of his patrol vehicle. App. 5.[2]

b. The Tenth Circuit's Analysis of the Fourth Amendment Issue

The Tenth Circuit found no constitutional violation occurred during the course of the search and seizure. App. 5-11.

1) Justifiable Traffic Stop at Inception

The court found the traffic stop for speeding was permissible at the outset. App. 6. Ms. Villa did not dispute this point in the Tenth Circuit, App. 6, and she does not dispute it here.

2) Consensual Encounter

The Tenth Circuit found that Trooper McKay's detention of Ms. Villa incident to the traffic stop became a consensual encounter after the trooper a) returned to Ms. Villa her license, registration, and insurance documents, b) told her she was free to go, and c) asked additional questions of her, which she agreed to answer. App. 7-10.

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[2] Ms. Davis testified at trial that, after she and Ms. Villa had been arrested and placed in the back of Trooper McKay's vehicle, she hid the gun in the back seat. App. 5.

3) Further Detention During Prolongation of Traffic Stop

The consensual encounter then became a detention again. App. 4. The Tenth Circuit found the trooper's questioning of Ms. Villa during the consensual encounter gave rise to reasonable suspicion to prolong her detention. In support of this conclusion, the court noted that Ms. Villa made the following statements, which the court characterized as "inconsistent and unusual": a) she said she and Ms. Davis were going to Minnesota to visit family; b) she then clarified that they were going to visit Ms. Davis' family; c) she did not know the particular city in Minnesota to which they were headed; and d) they were going to Minnesota for only a two-day visit, and indicated that they might leave Ms. Villa's vehicle there in order to fly back to California. In light of this information and Ms. Villa's apparent nervousness, the court felt the trooper "had reasonable suspicion of criminal activity. . . ." App. 10-11.[3]

The court also concluded that the "reasonable suspicion did not dissipate" during the trooper's subsequent conversation with Ms. Davis, because, according to the court, Ms. Davis also mentioned the possibility of leaving the car in Minnesota, and Ms. Davis purportedly "contradicted" Ms. Villa by stating

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[3] The Tenth Circuit did not specify the type of criminal activity the trooper purportedly had reason to suspect to be afoot.

that they were planning to visit "their" family in Minnesota. App. 11.

REASONS FOR GRANTING THE PETITION

This case presents two questions for review concerning issues that have proven divisive in the circuit courts and state courts of last resort. First, this case presents a question concerning the meaning of the "except" clause in 18 U.S.C. § 924(c)(1)(A). The circuit courts are split on whether this clause precludes imposition of consecutive mandatory minimum terms of imprisonment in cases where one of the mandatory minimum terms is lengthier than that called for pursuant to § 924(c)(1)(A). Second, this case presents a question concerning the constitutionality of a police officer's prolongation of a detention incident to a routine traffic stop. The circuit courts are split on whether the duration of a traffic stop may be briefly extended to allow for suspicionless investigation unrelated to the reason for the traffic stop.[4]

Review on certiorari is warranted pursuant to this Court's Rule 10(a) in order to resolve these unsettled and important questions.

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[4] As discussed below, although the Tenth Circuit concluded reasonable suspicion justified prolongation of the traffic stop in this case, App. 10-11, there is no factual basis for that conclusion.

A. The Tenth Circuit's Decision in this Case Contributes to a Split of Authority Concerning the Meaning of the "Except" Clause in 18 U.S.C. § 924(c)(1)(A)

Circuit courts are split on the question whether a defendant convicted of both a drug trafficking crime carrying a ten-year mandatory minimum sentence and a transactionally related firearm offense carrying a five-year mandatory minimum must be sentenced to both mandatory minimum terms consecutively. *Compare United States v. Parker*, 549 F.3d 5, 10-12 (CA1 2008) (holding that both mandatory minimum terms must be imposed consecutively in these circumstances),[5] *with United States v. Williams*, 558 F.3d 166, 168-175 (CA2 2009) (holding that the five-year mandatory minimum is not applicable in such circumstances).[6]

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[5] Other circuit courts have come to the same conclusion as the First Circuit on this point: *United States v. Segarra*, 582 F.3d 1269, 1272-1273 (CA11 2009); *United States v. London*, 568 F.3d 553, 564 (CA5 2009); *United States v. Easter*, 553 F.3d 519, 524-527 (CA7 2009); *United States v. Alaniz*, 235 F.3d 386 (CA8 2000).

[6] In *United States v. Alvarado*, 622 F.Supp.2d 988 (E.D. Cal. 2009), the court allowed a defendant to withdraw his guilty plea based upon the Second Circuit's decision in *Williams*. Before *Williams* was decided, the defendant had pled guilty to a drug trafficking crime carrying a ten-year mandatory minimum and a related § 924(c) count. The guilty plea was entered pursuant to a written plea agreement that called for imposition of consecutive mandatory minimum terms of ten years for the drug trafficking offense and five years for the gun crime. 622 F.Supp.2d at 991,

(Continued on following page)

This Court has granted certiorari in two cases in which this circuit split is presented. *Gould v. United States*, No. 09-7073, 130 S.Ct. 1283 (2010); *Abbott v. United States*, No. 09-479, 130 S.Ct. 1284 (2010).

In the instant case, the Tenth Circuit noted the circuit split and joined with the circuit courts that have concluded both the ten-year mandatory minimum and the five-year mandatory minimum must be imposed consecutively. The court rejected Ms. Villa's argument that the five-year mandatory minimum was preempted by the ten-year mandatory minimum. App. 14-21.

Ms. Villa respectfully requests this Court to either grant this petition or hold this case pending plenary review in *Gould* and *Abbott* so that the case can be GVR'd[7] if *Gould* and *Abbott* are decided in a

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995. After the defendant entered his guilty plea, but before sentencing could go forward, the Second Circuit handed down its decision in *Williams*. *Id.* at 992, 995. Based upon *Williams*, the defendant contended the five-year mandatory minimum for his § 924(c) conviction was inapplicable in light of the greater ten-year mandatory minimum for his related drug trafficking conviction. Thus, he sought to withdraw from the plea agreement that called for consecutive stacking of these two mandatory minimum terms. *Id.* at 993. The district court, which was under the jurisdiction of the Ninth Circuit, granted the motion, because there was no Ninth Circuit decision on point and because *Williams* supports "the proposition that § 924(c) is inapplicable where [a related] drug trafficking offense provides a greater mandatory minimum sentence." *Id.* at 995.

[7] A GVR order is an order "*granting* certiorari, *vacating* the judgment below, and *remanding* for further proceedings in light

(Continued on following page)

manner consistent with the argument Ms. Villa advanced in the Tenth Circuit. *Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.") (italics omitted).

The Tenth Circuit's decision in this case, while consistent with other circuit court decisions that the "except" clause of § 924(c) does not bar imposition of a separate five-year mandatory minimum term when a greater mandatory minimum term has been imposed for a transactionally related offense, *United States v. Parker*, 549 F.3d at 10-12, is inconsistent with the plain meaning of the text of § 924(c)(1)(A). *United States v. Williams*, 558 F.3d at 170-173. In that statutory provision, Congress specified that the mandatory minimum sentences authorized in the provision for certain gun offenses do not apply in cases where "a greater minimum sentence is otherwise provided . . . by any other provision of law." The statute pursuant to which Ms. Villa was sentenced to a ten-year mandatory term of imprisonment, 21 U.S.C. § 841(b)(1)(A), is one of these "other provision[s] of law." Because the meaning of the "except" clause in 18 U.S.C. § 924(c)(1)(A) is plain, "the sole function of the courts

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of intervening developments. . . ." *Thomas v. American Home Products, Inc.*, 519 U.S. 913 (1996) (Scalia, J., concurring) (italics in the original).

is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *accord*, *Carcieri v. Salazar*, 129 S.Ct. 1058, 1063-1064 (2009). The Second Circuit hewed to this plain meaning of § 924(c)(1)(A) in *United States v. Williams*, 558 F.3d at 170-173. The Tenth Circuit's interpretation of the statutory provision in the instant case deviated from this plain meaning.

Because of comments the district court made at the time it sentenced Ms. Villa, this case is an ideal case for resolution of the circuit conflict concerning the meaning of the "except" clause in 18 U.S.C. § 924(c)(1)(A). As noted above, the district court made clear that its interpretation of the statutory language, which is contrary to the Second Circuit's interpretation of that language, compelled it to impose a sentence it deemed unjustifiably harsh. App. 44-45, 55. Because the district court stated "a sentence of ten years would be sufficient" punishment in this case, App. 45, and that the 15-year sentence the court felt bound to impose was "far greater than . . . necessary[,]" App. 55, Ms. Villa is plainly entitled to relief if the Second Circuit's interpretation of 18 U.S.C. § 924(c)(1)(A) is correct.

B. Prolongation of a Traffic Stop to Conduct Suspicionless Investigation Unrelated to the Reason(s) Justifying the Traffic Stop Violates the Fourth Amendment.

"[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id.* "An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, *so long as those inquiries do not measurably extend the duration of the stop.*" *Arizona v. Johnson*, 129 S.Ct. 781, 788 (2009) (italics added).

Although *Caballes* and *Johnson* seemingly prohibit any suspicionless investigation that measurably prolongs a traffic stop, a circuit split exists concerning this subject: *United States v. Peralez*, 526 F.3d 1115, 1120 (CA8 2008) ("[W]e acknowledge[ ] a split among the circuit courts as to whether an officer conducting a traffic stop based upon probable cause violates the Fourth Amendment by asking a few questions about matters unrelated to the traffic violation, even if this conversation briefly extends the length of the detention."); Reid M. Bolton, Comment, *The Legality of Prolonged Traffic Stops After Herring: Brief Delays as Isolated Negligence*, 76 U. Chi. L.Rev. 1781,

1790-1796 (2009) (discussing the gradual development of the circuit split).

On one side of this circuit split, the Eleventh Circuit has established a bright-line rule that the perpetuation of a traffic stop for a period of time "any longer than necessary to process the traffic violation" violates the Fourth Amendment. *United States v. Pruitt*, 174 F.3d 1215, 1219 (CA11 1999) (internal quotation marks omitted); *accord United States v. Perkins*, 348 F.3d 965, 971 (CA11 2003) (holding a delay unlawful where the officer had to wait for a canine unit and asked questions completely unrelated to the purpose of the traffic stop); *see United States v. Ramirez*, 476 F.3d 1231, 1237 (CA11 2007) (affirming the bright-line rule that "a traffic stop must last no longer than is necessary to effectuate the purpose of the stop"), *cert. denied*, 551 U.S. 1108 (2007).[8]

On the other side of the circuit split, some courts have held that brief, suspicionless prolongations of traffic stops do not necessarily violate the Fourth Amendment. *United States v. Everett*, 601 F.3d 484, 492 (CA6 2010) (declining to impose "a categorical

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[8] The Eleventh Circuit has noted two exceptions to this bright-line rule: "Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances: First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. . . . Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter." *United States v. Pruitt*, 174 F.3d at 1220.

ban on suspicionsless unrelated questioning that may minimally prolong a traffic stop"); *United States v. Turvin*, 517 F.3d 1097, 1099-1104 (CA9 2008) (brief pause in ticket-writing process to ask questions unrelated to the traffic stop, thereby prolonging the detention, is not necessarily unreasonable); *United States v. Childs*, 277 F.3d 947, 952-954 (CA7 2002) (*en banc*) (brief prolongation of a traffic stop to ask "[q]uestions that hold potential for detecting crime, yet create little or no inconvenience, do[es] not turn reasonable detention into unreasonable detention").[9]

The Eleventh Circuit's bright-line "no prolongation" rule is faithful to this Court's Fourth Amendment jurisprudence in the traffic stop context. *Caballes* makes this clear. In *Caballes*, this Court concluded that a vehicle search conducted based upon a canine alert that occurred "*[w]hile* [an officer] was in the process of writing a warning ticket," was constitutionally permissible. 543 U.S. at 406-410 (italics added). The dog sniff did not extend "the duration of the [traffic] stop" or "the ordinary inquiries incident to such a stop." *Id.* at 408. However, this Court observed that if the dog sniff had "occurred during the

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[9] *Childs* "was the first circuit case to allow brief delays unsupported by reasonable suspicion. . . ." Bolton, *The Legality of Prolonged Traffic Stops*, 76 U. Chi. L.Rev. at 1792. Professor LaFave has sharply criticized *Childs*, characterizing it as a decision motivated by "nothing more than a desire to assist police in their efforts to use traffic stops as a means of seeking drugs." 4 Wayne R. LaFave, *Search and Seizure* § 9.3(b), p. 374 (4th ed. 2004).

course of an unreasonably prolonged traffic stop, . . . use of the dog and the subsequent discovery of contraband [would have been] the product of an unconstitutional seizure." *Id.* at 407-408. In support of this proposition, this Court cited the Illinois Supreme Court's decision in *People v. Cox*, 202 Ill. 2d 462, 782 N.E.2d 275, 270 Ill. Dec. 81 (2002). In *Cox*, the Illinois Supreme Court held: "An officer may not stall at the scene of a traffic stop until a drug-sniffing dog arrives and creates probable cause to conduct a search of a vehicle." 782 N.E.2d at 280 (internal quotation marks omitted). The drug sniff dog in the *Cox* case "arrived at the scene approximately 15 minutes after the initial traffic stop." *Id.* That was an unconstitutional prolongation of the detention incident to the traffic stop. *Id.*

Like *Caballes* and *Cox*, the instant case involved a dog sniff. And like *Cox*, but unlike *Caballes*, the dog sniff occurred following a prolongation of the traffic stop for over ten minutes. Thus, this Court's approval in *Caballes* of the holding in *Cox* demonstrates that the prolongation of Ms. Villa's traffic stop to await the arrival of a drug detection dog violated Ms. Villa's Fourth Amendment rights.

Nothing about the traffic infraction for which Ms. Villa was stopped or the information Trooper McKay gathered during the stop provided the trooper with an objective basis for entertaining a reasonable suspicion that illegal drug activity was afoot. The trooper may have had a hunch, and while that hunch may have reflected good police intuition, it did not amount to

reasonable suspicion. Reasonable suspicion cannot be based on an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Terry v. Ohio*, 392 U.S. 1, 27 (1968).[10] While the Tenth Circuit concluded Ms. Villa's apparent nervousness, along with the uncertainty of Ms. Villa and Ms. Davis as to certain aspects of their travel plans, constituted "specific articulable facts which reasonably supported [a] belief that Ms. Villa's trip was for an illicit purpose and thus justified her continued detention[,]" App. 11, that conclusion is undermined by the circumstances that Trooper McKay had told Ms. Villa she was free to leave after he issued her the warning ticket, App. 3,[11] and that he gathered no new information in the renewed detention after that point[12] other than learning that the ladies might fly home from Minnesota. Such information did not give rise to any reasonable suspicion of any criminal activity to justify prolongation of the traffic stop. *Terry v. Ohio*, 392 U.S. at 27.

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[10] Although *Terry* was not a traffic stop case, the permissible bounds of temporary investigative detentions established in *Terry* govern the scope of routine traffic stops. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) ("A routine traffic stop . . . is a relatively brief encounter and is more analogous to a so-called *Terry* stop than to a formal arrest.") (internal quotation marks and ellipsis omitted).

[11] Necessarily, the trooper had no reasonable suspicion of criminal activity when he told Ms. Villa she was free to leave.

[12] As noted above, the government conceded that a renewed detention commenced shortly after the trooper had told Ms. Villa she was free to go. App. 78.

Review on certiorari is warranted to assess whether the duration of a traffic stop may be prolonged without reasonable suspicion of criminal activity in order to allow a drug detection dog to be brought to the scene to sniff the stopped vehicle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VICTOR S. HALTOM
Attorney for Petitioner
Josefina C. Villa

May 26, 2010

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEFINA C. VILLA, Defendant-Appellant.	No. 08-8100

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D. Ct. No. 1:07-CR-00036-WFD-1)

(Filed Dec. 29, 2009)

Ronald G. Pretty, Cheyenne, Wyoming, appearing for Appellant.

David A. Kubichek, Assistant United States Attorney (Kelly H. Rankin, United States Attorney, with him on the brief), Office of the United States Attorney for the District of Wyoming, Casper, Wyoming, appearing for Appellee.

Before **TACHA** and **GORSUCH**, Circuit Judges, and **STAMP**, Senior District Judge*.

TACHA, Circuit Judge.

A jury convicted defendant-appellant Josefina Villa of possessing with intent to distribute at least 500 grams of methamphetamine and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. § 2, and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). On appeal, she challenges: (1) the denial of her motion to suppress evidence of the crimes; (2) the sufficiency of the evidence supporting her conviction for the firearm offense; and (3) her sentence for the firearm offense. We take jurisdiction under 28 U.S.C. § 1291 and AFFIRM.

I. BACKGROUND

On the morning of December 6, 2006, Trooper McKay of the Wyoming Highway Patrol pulled over Ms. Villa for speeding on a highway east of Cheyenne, Wyoming. He approached the car on its passenger side where Angela Davis was sitting. In response to

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* The Honorable Frederick P. Stamp, Jr., Senior United States District Judge for the Northern District of West Virginia, sitting by designation.

questions from the trooper, the women explained they were driving to Minnesota to visit family. Trooper McKay noticed two cell phones on the front console and two small duffel bags in the backseat. He also thought Ms. Villa was acting nervously but that Ms. Davis was acting overly friendly.

After Ms. Villa provided her license, registration, and insurance, Trooper McKay noticed that her license listed a California address but the car was registered in Nevada and the insurance information listed another Nevada address. The car also had been registered and insured only two weeks before. Trooper McKay took Ms. Villa's documents back to his patrol car, where he ran the information through his dispatch. After her information came back clear, Trooper McKay asked Ms. Villa to join him in the patrol car to clarify some questions. Ms. Villa complied. In the car, Trooper McKay began filling out a warning ticket and asked Ms. Villa where she lived. She explained that she lived in California but that the car was registered in Nevada because her boyfriend lived there. In response to additional questions from Trooper McKay, Ms. Villa stated again that she was going to Minnesota but this time said it was to visit Ms. Davis's family. Ms. Villa could not say to which city in Minnesota they were traveling. Trooper McKay finished writing the ticket, returned Ms. Villa's license, registration, and insurance information to her, and told her she was free to go.

As Ms. Villa was getting out of the patrol car, however, Trooper McKay requested permission to ask

her a few more questions. Ms. Villa verbally agreed and remained in the car. Trooper McKay asked her again where the women were going in Minnesota. Ms. Villa said she did not know, because she had just woken up, but that they were planning to stay in Minnesota for two days. When Trooper McKay told her that was a long trip to make for only a two-day visit, Ms. Villa responded that she might fly back, apparently leaving her car in Minnesota.

Trooper McKay asked her to stay in the patrol car while he returned to Ms. Villa's car to question Ms. Davis about their travel plans. Ms. Villa, however, followed Trooper McKay out of the car. Ms. Davis also told Trooper McKay that she was going to Minnesota to visit family for a short time, and that she, too, might fly back. In contrast to Ms. Villa's statement, however, Ms. Davis indicated that she and Ms. Villa were related and that they were going to visit their family. When Trooper McKay asked how well Ms. Davis knew Ms. Villa, Ms. Davis responded, "like most families do. We just hang around a little bit."

Trooper McKay then asked Ms. Villa for consent to search the car. She refused. He detained both women and called a K-9 unit, which arrived approximately eleven minutes later. The dog alerted to the presence of drugs and a subsequent search of the car revealed two packages of methamphetamine under a panel.

At Ms. Villa's trial, Ms. Davis testified for the government. She explained that Ms. Villa's brother had offered them a .22-millimeter Beretta handgun for their protection during the trip. The women declined the offer but later found the gun packed in their belongings the night before they were stopped by Trooper McKay. From that point, Ms. Villa kept the gun either in her boot or in the car's console. When Trooper McKay pulled them over, Ms. Villa told Ms. Davis to put the gun in her pants. Later, when the women had been arrested and were sitting in the back of the patrol car, Ms. Davis hid the gun in the back seat. Trooper McKay found the gun two months later.

The jury convicted Ms. Villa of possessing with intent to distribute methamphetamine and aiding and abetting, and possessing a firearm in furtherance of a drug trafficking crime. The district court sentenced her to the ten-year mandatory minimum term for the methamphetamine conviction, *see* 21 U.S.C. § 841(b)(1)(A)(viii), and to a consecutive five-year sentence for the firearm conviction, *see* 18 U.S.C. § 924(c)(1)(A)(i).

II. DISCUSSION

A. Denial of Motion to Suppress

Prior to trial, Ms. Villa moved to suppress evidence seized as a result of the traffic stop and subsequent search. The district court denied the motion, which she now appeals.

The touchstone under the Fourth Amendment is reasonableness. *United States v. Holt,* 264 F.3d 1215, 1220 (10th Cir. 2001) (en banc). The reasonableness of a traffic stop is examined under a two-part test: first, whether the officer's action was justified at its inception; and second, whether the officer's action during the stop was "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*

Ms. Villa does not dispute that the traffic stop was justified at its inception – i.e., that she was speeding. *See United States v. DeGasso,* 369 F.3d 1139, 1143 (10th Cir. 2004) (a traffic stop is reasonable under the Fourth Amendment "if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring") (quoting *United States v. Botero-Ospina,* 71 F.3d 783, 787 (10th Cir. 1995) (en banc)). Instead, she first argues that once Trooper McKay had run her license and registration information through dispatch and it came back clear, there was no longer any continued need for the detention. Thus, according to Ms. Villa, Trooper McKay's instruction that she accompany him to his patrol car and his additional questions regarding her address and travel plans while he issued the ticket were unlawful.

It is well-established that:

> A law enforcement officer conducting a routine traffic stop may request a driver's license

> and vehicle registration, run a computer check, and issue a citation. When the driver has produced a valid license and proof of entitlement to operate the car, the driver must be allowed to proceed without further delay for additional questioning.

United States v. Elliott, 107 F.3d 810, 813 (10th Cir. 1997). Here, however, Trooper McKay was in the process of writing the warning ticket when he asked Ms. Villa about her address and travel plans; he had not yet issued Ms. Villa the warning citation. In addition, we have often held that "questions relating to a driver's travel plans ordinarily fall within the scope of a traffic stop," *United States v. Williams*, 271 F.3d 1262, 1267 (10th Cir. 2001), and that such questions are permissible so long as they do not prolong the stop, *see United States v. Wallace*, 429 F.3d 969, 974 (10th Cir. 2005). Moreover, given the different addresses listed on Ms. Villa's license, insurance, and registration, it was entirely reasonable for Trooper McKay to ask Ms. Villa to come to the patrol car and to clarify which address to write on the ticket.[1]

Next, Ms. Villa argues that she did not consent to further questioning by Trooper McKay after he issued

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[1] Citing Wyo. Stat. Ann. § 31-7-137, Ms. Villa contends that "Wyoming law mandates that the address on your driver's license is the correct address and therefore the 'request to clarify' was nothing more than a smokescreen to continue to detain [Ms. Villa]." Applt. Br. 23. But even if § 31-7-137 imposes such a requirement (which we do not suggest), the statute is inapplicable to Ms. Villa, who owned a California driver's license.

the ticket and told her she was free to leave. "Typically, an officer must allow the driver to leave once the initial justification for a traffic stop has concluded." *United States v. Manjarrez,* 348 F.3d 881, 885 (10th Cir. 2003). Once an officer returns the driver's license and registration, the traffic stop has ended and questioning must cease; at that point, the driver must be free to leave. *See id.* "This general rule, however, is subject to an important exception. Additional questioning unrelated to the traffic stop is permissible if the detention becomes a 'consensual encounter.'" *Id.* (quoting *United States v. Hunnicutt,* 135 F.3d 1345, 1349 (10th Cir. 1998)). Whether the driver has consented to additional questions and detention turns on whether "a reasonable person would believe he was free to leave or disregard the officer's request for information." *Id.* at 886.

Ms. Villa relies primarily on two facts to argue that a reasonable person would not have felt free to disregard Trooper McKay's request to answer additional questions: (1) Trooper McKay was armed and in uniform; and (2) she had not yet fully exited his patrol car. We have held, however, that these two factors alone are not sufficient to cause a reasonable person to feel that he is not free to leave. In *United States v. Bradford,* 423 F.3d 1149 (10th Cir. 2005), the defendant was sitting in the back of the officer's patrol car when the officer asked for answers to further questions. We explained that "[t]he fact that [the defendant] was sitting in . . . [the trooper's] patrol car,

without more, does not make her consent involuntary." *Id.* at 1158. We went on to state:

> Although we are troubled by the fact that [the defendant] was sitting in the patrol car while [the officer] questioned her after handing back her documents, there is no indication here that [the officer] made any "coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled," suggesting that the detention had not ended.

Id. at 1159 (citation omitted). Similarly, in *United States v. Hernandez*, we reasoned:

> We conclude that a reasonable person would have believed he was free to leave. [The officer] had returned [the defendant's] license and registration and told him he was free to go. [The defendant] must have believed he was free to leave at that point because the district court found he turned to get out of the car. [T]he only officer present then inquired if he could ask some questions. There was no evidence that [the officer] used a commanding or threatening manner or tone of voice, displayed a weapon, or touched [the defendant]. . .

93 F.3d 1493, 1499 (10th Cir. 1996).

In this case, Ms. Villa was in the process of exiting the patrol car, but there was no evidence of a coercive show of authority that would make a reasonable person feel that she was not free to leave. Trooper McKay was uniformed and armed, but that also appears to have been the case in *Bradford* and *Hernandez*. *See also United States v. Werking*, 915 F.2d 1404, 1407 (10th Cir. 1990) (fact that officer is in uniform, without more, is insufficient to demonstrate consent was involuntary). Absent a display of the weapon or some other type of show of authority, we conclude that Ms. Villa voluntarily consented to the further questioning.

Finally, Ms. Villa argues that Trooper McKay did not have reasonable suspicion to detain Ms. Villa while he spoke with Ms. Davis, and later to detain both of them while he called for the K-9 unit. *See Hunnicutt*, 135 F.3d at 1349 (lengthening the detention beyond that necessary for the initial stop is permissible only if the detention has become a consensual encounter or the officer "has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring"). We conclude that Trooper McKay had reasonable suspicion of criminal activity that supported these detentions. At the point when Trooper McKay decided to question Ms. Davis, Ms. Villa had given him the following inconsistent and unusual statements: she had first told him they were going to visit family, then clarified that it was Ms. Davis's family; although she was driving the car, she did not know which city they were visiting; her

reason for not knowing the destination was because she had just woken up; the women were driving all the way from California to Minnesota for only a two-day visit; and Ms. Villa might leave her newly purchased car in Minnesota and fly back to California. Given these statements, in addition to Ms. Villa's nervousness, Trooper McKay had specific, articulable facts which reasonably supported his belief that Ms. Villa's trip was for an illicit purpose and thus justified her continued detention. *See United States v. Kopp*, 45 F.3d 1450, 1454 (10th Cir. 1995) (implausible or unusual travel plans, combined with unusual nervousness, can contribute to reasonable suspicion). This reasonable suspicion did not dissipate upon Trooper McKay's conversation with Ms. Davis. Some of her statements contradicted Ms. Villa's, such as her explanation that the women were going to visit "their" family. She also suggested that she might fly back to California, which would have left the car in Minnesota without its owner or passenger. Trooper McKay was therefore justified in detaining both women for eleven minutes while a K-9 unit was called to the vehicle. Finally, to the extent Ms. Villa contends that the subsequent search was unlawful, it is well-established that a dog sniff provides the requisite probable cause to search a vehicle for drugs. *See United States v. Klinginsmith*, 25 F.3d 1507, 1510 (10th Cir. 1994).

B. Sufficiency of the Evidence: Possessing a Firearm "In Furtherance Of" a Drug Trafficking Crime

18 U.S.C. § 924(c)(1)(A) prohibits using or carrying a firearm during or in relation to a drug trafficking crime, or possessing a firearm in furtherance of a drug trafficking crime. The predicate crime in this case was Ms. Villa's methamphetamine offense, and she was prosecuted under the possessing-in-furtherance prong of the statute. On appeal, she does not challenge whether she possessed the firearm; rather, she contends that her possession did not further the drug trafficking crime.

Merely possessing a firearm does not establish the "in furtherance" element of § 924(c)(1)(A). *United States v. Garza*, 566 F.3d 1194, 1202 (10th Cir. 2009). Instead, the government must prove that "the weapon furthered, promoted or advanced a drug trafficking crime." *United States v. Poe*, 556 F.3d 1113, 1127 (10th Cir. 2009) (quotations omitted). "This standard is satisfied if the firearm was kept available for use should it be needed during a drug transaction, and the defendant intended the firearm to be accessible for that purpose." *Id.* To assess whether the defendant had the requisite intent, we consider a number of factors, including:

> (1) the type of drug activity conducted, (2) the accessibility of the firearm, (3) the type of firearm, (4) the legal status of the firearm, (5) whether the firearm was loaded, (6) the proximity of the firearm to drugs or

> drug profits, and (7) the time and circumstances under which the firearm was found.

Id. Thus, while possession of a firearm in proximity to drugs does not necessarily show that the firearm was possessed in furtherance of drug trafficking, "it could be considered by the jury along with other circumstantial evidence to determine whether the defendant intended to possess the weapon 'in furtherance of' drug trafficking." *United States v. Lott,* 310 F.3d 1231, 1247 (10th Cir. 2002).

In this case, Ms. Villa kept the .22-millimeter Beretta handgun in her boot and in the console of the car where the drugs were found. Although Ms. Davis testified that Ms. Villa's brother had put it in the women's belongings unbeknownst to them, and that the two women had been looking for a place to discard the gun when they were pulled over (thereby demonstrating a lack of intent to use it), the jury was free to disbelieve this testimony. As the government argues, the evidence – viewed with an eye toward the relevant factors – was sufficient to support the jury's finding that Ms. Villa possessed the handgun in furtherance of drug trafficking: (1) the type of drug activity being conducted was not limited to small-time users; instead, Ms. Villa was transporting approximately $250,000 worth of methamphetamine from California to Minnesota; (2) Ms. Villa kept the gun where she had immediate access to it; (3) the gun was loaded; and (4) the gun was kept in close proximity to the drugs in the car. In light of our precedent on the matter, sufficient evidence supports Ms. Villa's

conviction for possessing the firearm in furtherance of the methamphetamine trafficking.

C. Consecutive Sentence for the § 924(c)(1)(A)(i) Conviction

Ms. Villa was sentenced to the ten-year statutory mandatory minimum for the methamphetamine conviction. *See* 21 U.S.C. § 841(b)(1)(A)(viii). The § 924(c)(1)(A)(i) conviction carries a five-year mandatory minimum sentence, which the district court imposed to run consecutively to the § 841 sentence. On appeal, Ms. Villa contends that because the sentence for the predicate offense underlying her § 924(c) conviction provides for a greater minimum sentence than that for the § 924(c) conviction itself, the district court erred in imposing the two sentences.

Ms. Villa's argument is grounded in the so-called "except clause" or "prefatory clause" of § 924(c), which states:

> (c)(1)(A) *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law,* any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added).

Section 924(c) goes on to provide for longer sentences for specified types of firearms (such as short-barreled rifles and machineguns) and for repeat offenders. *Id.* § 924(c)(1)(B), (c)(1)(C). The subsection also states that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." *Id.* § 924(c)(1)(D).

Ms. Villa contends that under the prefatory clause to § 924(c), a greater minimum sentence is provided by § 841(b)(1)(A)(viii), and therefore this ten-year sentence either displaces the five-year sentence under § 924(c)(1)(A)(i) or mandates that it run concurrently to the § 841 sentence. Several courts of appeals have considered this or a similar interpretation of § 924(c). Eight have rejected it. *See United States v. Segarra*, 582 F.3d 1269 (11th Cir. 2009); *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009); *United States v.*

Easter, 553 F.3d 519 (7th Cir. 2009); *United States v. Parker*, 549 F.3d 5 (1st Cir. 2008); *United States v. Collins*, 2006 WL 2921225 (5th Cir. Oct. 12, 2006); *United States v. Jolivette*, 257 F.3d 581 (6th Cir. 2001); *United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000). One circuit has embraced it. *See United States v. Williams*, 558 F.3d 166 (2d Cir. 2009); *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008). Today we join the majority of those courts and hold that the prefatory clause to § 924(c) refers only to a minimum sentence provided by § 924(c) or any other statutory provision that proscribes the conduct set forth in § 924(c).

In interpreting a statute, we start with its language, *Williams v. Taylor*, 529 U.S. 420, 431 (2000), giving effect to its "most natural reading." *United States v. Ressam*, 533 U.S. 272 (2008). In this way, "[w]e consider not only the bare meaning of the [text] but also its placement and purpose in the statutory scheme," *United States v. Bailey*, 516 U.S. 137, 145 (1995), because "the meaning of statutory language, plain or not, depends on context." *Id.* (alterations and quotations omitted).

The prefatory clause to § 924(c) refers to "a greater minimum sentence . . . provided by . . . any other provision of law." The clause, however, "does not say a 'greater minimum sentence' *for what*," though it must "have *some* understood referent to be intelligible." *Parker*, 549 F.3d at 11. Ms. Villa suggests that the referent should be broadly conceived to include a

minimum sentence for the predicate crime underlying the § 924(c) conviction. We disagree. The prefatory clause does not "mean 'when a greater minimum sentence *for any other crime* is otherwise provided by law.'" *Abbott,* 574 F.3d at 211 (quoting *Parker,* 549 F.3d at 11). Indeed, the text of § 924(c) contains no such language. *See Alaniz,* 235 F.3d at 389 ("We have scoured the statutory language, yet we find no support for the proposition . . . that subdivision (c)(1)(A)'s 'greater minimum sentence' clause applies to the predicate drug trafficking crime or crime of violence of which a particular defendant has been convicted."); *Parker,* 549 F.3d at 11 (reading the referent to mean "'any other crime related to this case' or 'the underlying drug crime or crime of violence' . . . require[s] reading into the clause a referent not literally expressed").

Moreover, the context of the statute compels a more narrow interpretation of the clause's referent. The phrase "except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law" is followed directly by the specific types of conduct prohibited under § 924(c). Because there is no linguistic or contextual demarcation separating the proscribed conduct from the prefatory clause, the most natural reading of that language "connotes a comparison between alternative minimum sentences for a violation of § 924(c), not between sentences for separate violations of § 924(c) and another statute." *Abbott,* 574 F.3d at 211; *see also Easter,* 553 F.3d at 526 ("In the

contest between reading the 'except' clause to refer to penalties for the offense in question or to penalties for any offense at all, we believe the former is the most natural."). Accordingly, "a defendant convicted under § 924(c)(1) shall be sentenced to a term of imprisonment set forth in § 924(c)(1)(A) unless subsections (c)(1)(B) or (c)(1)(C), or another penalty provision elsewhere in the United States Code, requires a higher minimum sentence for that § 924(c)(1) offense." *Easter,* 553 F.3d at 526;[2] *see also Abbott,* 574 F.3d at 208 ("In referring to alternative minimum sentences, the prefatory clause mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the future – in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922.").

This reading is not only the most faithful to the statutory language, it also avoids absurd results at odds with the statute's purpose. *See Lamie v. United States Trustee,* 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain,

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[2] For example, § 924(j)(1) provides for life imprisonment for a defendant who, in the course of violating § 924(c), causes the first-degree murder of another person. *See* 18 U.S.C. § 924(j)(1); 18 U.S.C. § 1111(b). Thus, a defendant who might otherwise be subject to a five-, seven-, or ten-year sentence under § 924(c)(1)(A)(i)-(iii) would instead be sentenced under § 924(j)(1), as that provision provides for a greater minimum sentence for the § 924(c) offense. *Cf. United States v. Battle,* 289 F.3d 661 (10th Cir. 2002) (affirming a sentence under § 924(c)(1) and (j)(1) of life in prison that was imposed consecutively to the sentence for the predicate offense underlying the § 924(c) conviction).

the sole function of the courts – *at least where the disposition required by the text is not absurd* – is to enforce it according to its terms.") (emphasis added and quotations omitted). The prefatory clause first appeared as part of the 1998 amendment to § 924(c)(1), which was enacted in response to the Supreme Court's decision in *Bailey v. United States,* 516 U.S. 137 (1995). *Easter,* 553 F.3d at 526. In *Bailey,* the Supreme Court adopted a narrow definition of the term "use"; thereafter, Congress broadened § 924(c)(1) to prohibit not only using or carrying a firearm but also possessing a firearm.[3] *Abbott,* 574 F.3d at 207 &

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[3] The prior version of § 924(c)(1) read:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of

(Continued on following page)

n.3; *Alaniz,* 235 F.3d at 389. But the interpretation advanced by Ms. Villa and the Second Circuit would narrow – not expand – the reach of § 924(c), as "many defendants convicted under § 924(c)(1) would receive no punishment for the conviction." *Easter,* 553 F.3d at 526; *see also Alaniz,* 235 F.3d at 390 ("Congress meant to broaden the reach of the statute, not further restrict it."). Even more nonsensical is the fact that the most culpable defendants would be the ones who would escape such punishment. As the *Alaniz* court explained:

> That construction would punish those guilty of severe offenses more leniently, and those guilty of less severe offenses more stringently, an illogical result. The most serious drug crimes and crimes of violence (those already carrying mandatory minimum sentences) would not be enhanced by a consecutive firearm sentence despite the fact that a gun was involved. Meanwhile, less serious crimes (to which no minimum mandatory sentences apply) would be enhanced by a consecutive firearm sentence when committed with a gun.

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violence or drug trafficking crime in which the firearm was used or carried.

21 U.S.C. § 924(c)(1) (1996).

235 F.3d at 389. In our view, Congress did not intend such a bizarre result.[4] *See Abbott*, 574 F.3d at 209.

In short, we join the majority of courts to have addressed the issue and conclude the most natural reading § 924(c) is that its prefatory clause refers only to a minimum sentence provided by § 924(c) or any other statutory provision that proscribes the conduct set forth in § 924(c). Accordingly, a defendant convicted under § 924(c)(1) shall be sentenced to a term of imprisonment set forth in § 924(c)(1)(A) unless subsections (c)(1)(B) or (c)(1)(C), or another penalty provision elsewhere in the United States Code, requires a higher minimum sentence for that § 924(c)(1) offense. Thus, the district court did not err in Ms. Villa's case by sentencing her to ten years on the methamphetamine conviction to be followed by a five-year sentence for the § 924(c)(1)(A) conviction.

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[4] The *Whitley* court reasoned that a district court's sentencing discretion would permit it to increase or decrease a particular defendant's sentence in order to maintain a more logical sentencing scheme. *See Whitley*, 529 F.3d at 155. We find this "solution" inadequate, as it amounts to a tacit recognition of the absurdity of the minority's interpretation. *See Abbott*, 574 F.3d at 210 ("This view asks too much because it fixes the statute as illogical and anomalous, then posits an ad hoc solution in each individual case."). In addition, Congress could not have contemplated this "solution" at the time of the 1998 amendment, as sentencing courts did not enjoy such discretion until 2005. *See United States v. Booker*, 543 U.S. 220 (2005).

III. CONCLUSION

For the foregoing reasons, we AFFIRM Ms. Villa's convictions and sentence.

APPENDIX B

United States District Court
For The District of Wyoming

UNITED STATES OF AMERICA,	**JUDGMENT IN A CRIMINAL CASE**
vs.	(Filed Dec. 6, 2008)
JOSEFINA C VILLA	CASE NUMBER: 07CR36-01-D
	Ronald G Pretty Defendant's Attorney

THE DEFENDANT: was found guilty on counts 1s and 2s after plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
21: USC 841(a)(1), (b)(1)(A)(iii) and 18 USC 2	Possession with Intent to Distribute Methamphetamine, and Aiding and Abetting	December 6, 2006	1s
18: USC 924(e)(1)(A)	Possession of Firearm in Furtheranee [sic] of Drug Traffieking [sic] Crime	December 6, 2006	2s

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is

imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's USM No: **09903-091**

December 2, 2008
Date of Imposition of Sentence

/s/ William F. Downes
William F. Downes
Chief, United States District Judge

Dec. 5, 2008
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months as to Count 1s and 60 months as to count 2s to run consecutive to count 1s.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed at a Bureau of Prison's Facility located at Dublin, CA

The Court *strongly* recommends the defendant participate in the Bureau of Prison's 500-hour Residential Drug Abuse Program

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years supervised release as to counts 1s and 2s to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released

within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance. Revocation of supervised release is mandatory for possession of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the U.S. Probation Officer.

Pursuant to Public Law 108-405, Revised DNA Collection Requirements Under the Justice for All Act of 2004, the defendant shall submit to DNA collection while incarcerated [sic] in the Bureau of Prisons, or at the direction of the U.S. Probation Office.

While on supervised release, the defendant shall not use or possess a firearm, ammunition, dangerous weapons or destructive device. Supervised release shall be revoked for possession of a firearm.

The defendant shall make special assessment and restitution payments as ordered by the Court and is required to notify the Court, through the Probation Office, of any material change in the defendant's economic circumstances that might affect the defendant's ability to meet these monetary obligations.

The defendant shall comply with the standard conditions that have been adopted by this Court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall participate in a program approved by the United States Probation Officer for substance abuse treatment, which may include testing to determine whether the defendant has reverted to the use of controlled substances.

The defendant shall refrain from the use or possession of alcohol and is prohibited from entering establishments whose chief source of income is derived from the sale of alcohol.

As a component of the defendant's treatment and testing program, the defendant shall pay a one-time fee of $250.00 to partially defray the costs of treatment and/or drug testing. Monetary payments made by the defendant shall be applied to this fee only after all other court-ordered monetary obligations have been fulfilled. Payment of the fee shall be made by money order or cashier's check to the Clerk of District Court, 2120 Capitol Avenue, 2nd Floor, Cheyenne, Wyoming 82001, utilizing the payment coupon provided by the probation office. ***This condition is waived in the event the defendant is supervised by a district other than Wyoming.***

The defendant shall obtain a mental health evaluation and participate in mental health counseling, until such time she is released from counseling by her supervising U.S. Probation Officer and mental health treatment provider.

The defendant shall submit her person, residence, office, or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;

2) the defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation

officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Restitution	Fine
1s	$100.00	N/A	Waived
2s	$100.00	N/A	Waived
Totals:	$200.00	$0.00	$0.00

FINE AND/OR RESTITUTION

The fine and/or restitution includes any costs of incarceration and/or supervision. The fine, which is due immediately, is inclusive of all penalties and interest, if applicable.

The defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the fine and/or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(1). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3512(g).

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment: (2) restitution: (3) fine principal: (4) cost of prosecution: (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

> In full immediately. Any fine balance not paid immediately or through the Inmate Financial Responsibility Program shall be paid beginning the month following release from confinement, in monthly installments of not less than $25.00.

All financial penalty payments are to be made to the Clerks Office, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CASE NO. 07-CR-36-D
VS.	)	December 2, 2008
JOSEFINA C. VILLA,	)	Casper, Wyoming
Defendant.	)	

TRANSCRIPT OF HEARING ON SENTENCING
BEFORE THE HONORABLE WILLIAM F. DOWNES
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	David Kubichek OFFICE OF UNITED STATES ATTORNEY Post Office Box 22211 Casper, Wyoming 82602
For the Defendant: (In Person)	Ronald G. Pretty Attorney at Law 2319 Pioneer Avenue Cheyenne, Wyoming 82001

Reported By: Jamie L. Hendrich, CSR-RPR-CRR
Official Federal Court Reporter
U.S. District Courthouse
111 South Wolcott, Room 217
Casper, Wyoming 82601
(307) 265-5280

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[3] THE CLERK: All rise.

(Court enters)

THE CLERK: Court is now in session.

THE COURT: Good morning. Please be seated.

Court is in session in Case 2007-CR-36-D, the United States of America versus Josefina Villa. Ms. Villa is present before the Court, having been found guilty of possession with intent to distribute methamphetamine and aiding and abetting as charged in Count One and possession of a firearm in furtherance of a drug-trafficking crime as charged in Count Two and is now before the Court for sentencing.

Have all the provisions of 18 United States Code 3552(d) been complied with here?

MR. KUBICHEK: They have for the United States, Your Honor.

THE COURT: Mr. Pretty?

MR. PRETTY: Other than my objections to the presentence report, they have, Your Honor.

THE COURT: All right. Ms. Villa, have you had an adequate opportunity to review the presentence investigation report with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has he answered all of your questions about this document, ma'am?

THE DEFENDANT: Yes, he has.

[4] THE COURT: Are you satisfied with your lawyer's representation of you in this matter?

THE DEFENDANT: Yes, I am.

THE COURT: I'll place the presentence report in the record under seal and direct, if an appeal is taken, access will be permitted to the sealed report. No information has been withheld from this report to my knowledge.

There are a number of issues that have been raised by the defense, most notably, of course, the application of the 924(c) provision. The government and defense have briefed this issue, and I'll hear argument on those matters now.

MR. PRETTY: Year Honor, I think that puts the ball in my court at this point in time because the government filed a 23-page brief, and this is my response to their brief.

Your Honor, I it's my understanding that the – the Whitley issue went up for an en banc hearing in front of the Second Court of Appeals and it was denied. And I do not know but I extremely doubt if it's gone up on a petition for writ of cert to the United States Supreme Court because a lot of times we've had that in here in some of my cases where – because you know the United States Government has to get the permission of the solicitor general in order to file a response, and they are close bad enough that the law is that way in the Tenth Circuit; let's not take the chance on it's gonna be that way all over. So, Your Honor; one of the things that was surprising to me [5] when I read the Whitley opinion and Mr. Kubichek's response was that the Tenth Circuit has not ruled on this opinion and this issue as to whether or not the –

when there's a ten-year drug case and then there's a five-year 924(c) case, that it must run consecutive to the ten plus five. They've always relied upon, I believe, the sentencing guidelines; and as this Court knows, the statute trumps the guidelines. Okay?

I've always likened my esteemed colleague and learned opponent to Cardinal Barbatelli [sic] who was one of the most loyal henchman of Pope Urban VI, and I was really focused on that when I read his dissertation as to the law as to Whitley and this issue.

But – however, Your Honor, the Court today must ignore what – the Fifth Circuit in Collins and the Sixth Circuit in Studifin and the Eighth Circuit in Alaniz wherein they reviewed the statute, and as cited on page 9 of the government's brief it says: "To read the statute as the district court did would thus, in the court's view, subvert Congress' clear purpose in the 1980 amendments to enhance rather than restrict the scope of 924(c)."

Now – and then it buttresses argument by a comment on – right above that from Representative McCollum. But, Your Honor, I think that the Court must understand that that one comment is by one representative of Congress, and the Court of Appeals found and also in Alaniz the Eighth Circuit [6] found that you can speculate as to why Congress may have done something or intended to do, but the ultimate and only thing this Court today must decide is what – is to read the statute and give the plain and clear meaning to what 51 members of the Senate, 218

members of the House of Representatives and the – agreed upon and what the President signed into law.

And the law is very clear. It's – there's no ambiguity about the statute. It is very clear that in this particular case with this particular set of facts that the Court must run these sentences concurrent and not consecutive.

Your Honor, it is – it's not your job to speculate or to guess the intentions of Congress and the President, but you must apply the law as enacted, and that is what the Whitley court is telling you to do. Now, this Whitley court is very clear that – as to this issue. This is the – it's a clear and unambiguous statute. The intent – you ignore what we may think the intent of Congress was, which is what Alaniz says, but you look at the plain meaning of the statute.

Now – and we want to – at least in the Studifin case, they talk about it being a double-jeopardy argument. We would raise the "double jeopardy" issue. However, we also want to make it clear that we are arguing statutory construction which is how this Court must rule.

The government, in its last seven pages of argument, focused upon why the Whitley court was wrong. It makes [7] comments like "it's only dicta for our purposes," ignoring the contents within which the clear – when the clause appears in the statute. I'm not sure how they can say that when the – you know, and the particular clause starts the statute, including that Whitley ignores context in its zeal to be literal,

potentially unclear statutory provisions and eviscerates two dependable factor – features of 924(c), enhanced sentence on top of any other underlying offense.

We would agree with one thing that Mr. Kubichek says when on page 18 he says: "Where the language used is clear and unambiguous, it must, of course, be honored."

Now, the language is clear, Your Honor, what the statute says. The court in Whitley found the statute to be unambiguous.

In our closing, Your Honor, we would like this Court to remember something: Legislation is the art of compromise. Legislation is what they can get 51 members of the Senate, 218 members of the house and the President to sign. It's compromise. People have to compromise their deeply held beliefs in order to get a law passed.

Now, if the government wants and believes that the law leads to absurd results, which is what it argued in the Bailey case, it is not – the government should not be coming to you, an Article III judge, and telling you to ignore the will of Congress, ignore the statute, ignore what the law says but do [8] what Representative McCollum says. We do not take the extreme positions of one member of Congress to make its decision as to whether or not a sentence run consecutive. What we take is what the compromise of the legislative branch and the executive branch worked out on the law.

If they are – if they do not like this law, they can do like any citizens can do and petition the court or petition the legislature for redress of its grievances and to try and get the law changed. That's what they did in 1996 after the Bailey case with – where the United States Supreme Court said that everybody was wrong. All the – all the courts – district courts and all the Court of Appeals was wrong in its interpretation of how – what "use" means. "Use" means "use," not all this intent of Congress-type stuff, all of this statutory context. "Use's means "use." All right?

Your Honor, it's clear. The legislature passed a law; says, except where there is a higher mandatory minimum, you don't do the lower mandatory minimum to run consecutive. Your Honor, I think the statute is clear. I think that this Court would be remiss in its duties as a follower of the law and a follower of the Constitution to give any other meaning to the statute than what Whitley says it means.

Thank you, Your Honor.

THE COURT: United States.

MR. KUBICHEK: May it please the Court.

[9] I think I've pretty well laid out our position in our sentencing memorandum. So I'm not going to go through all of that. I just have a couple of additional comments.

I think it's – the interesting thing about the Whitley case, of course, when you read it, is the judge who wrote it is focused exclusively on the concept of

divining the literal reading of the statute. But when he does that, he sort of ignores the plain meaning of the statute, it seems to me.

The purpose of that entire sentence that begins with the "except" clause is to delineate more significant penalties than the previous version of 924 for a person who uses, carries or possesses a firearm during or in relation to or in furtherance of one of the predicate offenses, and it is very clear that this is supposed to be an additional punishment.

The irony here is if you accept Whitley's literal reading, you read out the conduct portion of the sentence because the whole thing is to devise punishment for that particular kind of firearm-related conduct. Whitley ignores that although, grudgingly, later on in the decision, it says, "Well, there are some odd anomalies here, and maybe we could – if we said this was only related to firearm conduct, maybe that removes one of the anomalies."

But the firearms conduct in Whitley was simple possession of a firearm by a previously convicted felon who got an enhanced sentence because he had prior convictions for [10] crimes of violence as an armed career offender. There's – there's absolutely nothing about Whitley that makes sense in relation to the purpose of 924(c). And I think the Alaniz court talks about the legislative history only by virtue of noting that there wasn't very much of it. What there was was basically Representative McCollum's statement.

And one would have thought that if the purpose of this version of 924 was to totally overhaul the operation of the statute where actual punishment for 924 would be only an occasional thing rather than a mandatory additional thing in every case in which it applied, that Congress might have said something about that.

In this case there's – there's absolutely no suggestion whatsoever – it would certainly be odd that they would make such a dramatic change that the most serious offenders, as the court in Alaniz notes, effectively are not punished for a 924(c) violation. If someone is subject to a 10- or 20-year mandatory drug sentence and has a ten-year – as the Defendant Whitley did, a ten-year 924(c) violation, he gets no sentence for the 924(c) violation at all.

And Mr. Pretty says it's a concurrent sentence. No. Because if you read the "except" clause as it's written, if it means what the Second Circuit says, there's no punishment for a 924(c). You just get whatever that other sentence is, and that's the end of the discussion.

[11] I suggest that results in absurd outcomes that are wholly inconsistent with the history of the statute and the operation of the statute as we've always known it, and it's an odd – it would be an odd thing when Congress goes in to amend a statute to deal with what it perceived to be a problem under the court's decision in Bailey and in doing so doesn't toughen the statute as one might have thought it was

intending to do but instead creates giant loopholes that allow only the least offending of our defendants to 924(c) sentences while the more substantial offenders get nothing.

So I think Whitley is just a weird, odd, indefensible decision, and I think the Second – or the Sixth Circuit and the Eighth Circuit and the Fifth Circuit got it right.

THE COURT: You think the Second Circuit demonstrates its hostility to mandatory minimum sentences?

MR. KUBICHEK: I think it does and – and that's obviously a different question, but it – it is the – and you could sort of read that throughout because even though they sort of qualify it and say, "Well, some of the issues involved in this case could be taken away if we just sort of limit this to firearm stuff" – but they really don't mean that. In their view a 10-year or 20-year mandatory minimum drug sentence excuses one from whatever 924(c) violation one has unless it's a 25-year or a 30-year sentence in which case it's consecutive. Otherwise you get nothing at all.

[12] It's hostility to mandatory minimums, I suppose, and its rationale is so bizarre because it says – the court says, "Well, this is all easily cleared up. The sentencing court can just use its discretion under 3553(a) and make up for it."

Well, except when the 1998 amendments were passed, there was no such discretion under 3553(a).

The guidelines were mandatory. Upward and downward departures were very, very difficult to justify. And I suggest it would not have been possible – if, in fact, this reading of the statute was the right reading of the statute, then clearly Congress wouldn't have intended there to be that enhancement.

So we – we think this is a really, really bad decision, and we would urge the Court not to – not to follow it. And I think the rationale in the Alaniz decision and Studifin and Collins make a whole lot more sense and are certainly more consistent with what we view to be the plain meaning of the statute as it has always operated.

THE COURT: Rebuttal.

MR. PRETTY: Your Honor, I would submit if you look under – I think – I can't remember what the name of the book is, but it gives you synonyms and – for words. I think "literal" is a synonym for "clear and unambiguous."

Your Honor, I just – I think I am telling what our law is, and I believe I am going forth with what I believe our founding fathers did. If – if the justice Department does [13] not like the result of a law that Congress passed, then their job is to lobby their legislators for redress of a grievance and to ask that the law be changed.

Now, yes, Mr. Kubichek is correct in his saying that this came in – this came out of the Bailey change and the beliefs that the intent was to toughen the

law. Well, but he – that may be what he believes; but, Your Honor, it doesn't matter what he believes. It doesn't matter what McCollum says.

We look at the statute, the statute that our legislature passed and our president signed; and if this Court is to follow the will of the legislature and follow the will of the president, it cannot give consecutive sentences, Your Honor. Thank you.

THE COURT: I'll take a few minutes' recess at this time.

THE CLERK: All rise.

(Court exits)

THE CLERK: Court stands in recess.

(Recess)

THE CLERK: All rise.

(Court enters)

THE CLERK: Court is now in session.

THE COURT: Please be seated.

This Court has long expressed its hostility to mandatory gun sentences under 924(c) that ratchet up the level [14] of punishment for people such as drug offenders who are subject to mandatory minimum sentences for the predicate offense without regard to factors that Congress has instructed judges to take into account under 3553, Title 18.

And after 14-½ years of sentencing people, the Court has come to the conclusion that mandatory minimum sentences are antithetical to the whole concept of a sound sentencing policy; that it is rife with politics and, in many instances, yields unjust results.

For example, in this case a sentence of ten years would be sufficient but not greater than necessary to meet the purposes of sentencing established by Congress, but that will not be the result achieved here.

However disdainful this Court may be of the way that 924(c) is used to ratchet up the level of punishment, the fact remains that Congress' decision to do so reflects a legitimate albeit, in my view, an imprudent exercise of its authority.

In a perfect world, matters like this would be dealt with by gun enhancements under the guidelines. There's a certain schizophrenic component to sentencing in this country. On the hand Congress urges us to sentence in a way that is sufficient but not greater than necessary to meet its purposes of sentencing which in itself is delineated in 3553(a) and then by the Sentencing Reform Act of 1984 provides us useful tools to determine how a sentence would be appropriate and reflect [15] some uniformity in the way we sentence individuals for similarly situated circumstances nationwide. And then we come with the hammer that frankly ignores the Sentencing Reform Act of 1984 and its purposes, the purposes of sentencing established by Congress in its own statute. And I suspect at the heart of it, reading between

the lines, that may be what galls the Second Circuit. But in my view it is not the Second Circuit's prerogative to make the law.

I won't be as harsh in my denunciation of the Second Circuit's opinion as the United States has been in describing it here, but I will simply say that its logic is infirmed, especially when one looks at the other circuits that have addressed this issue. To follow the Second Circuit's rationale is to ignore the clear intent of Congress. There can be no other way to look at it. The other circuits have seen it just that way as I do. It's not the place of a judge to ignore the will of Congress.

I wish that members of Congress would come to this courthouse and watch people be sentenced. I wish they could get a steady diet of it for a month before they actually resume their duties as members of Congress. But they don't come here. They don't listen to the interests of district judges and to their views about sentencing, and frankly many don't care.

But to the issue at hand, the Court has reviewed – in addition to the Second Circuit case urged on this Court, U.S. [16] v. Whitley, has also reviewed United States versus Collins out of the Fifth Circuit; United States versus Alaniz out of the Eighth Circuit; U.S. v. Baldwin out of the Sixth Circuit which the Second Circuit in Whitley dismisses as dicta but nevertheless the Court found it instructive; U.S. v. Jolivette; and U.S. versus Studifin out of the Fourth Circuit. Citations are omitted.

And my reading of those cases convinces me that the United States should carry the day in this matter. The Court agrees with these courts that the structure and language of the 924(c)(1) provision – it is clear that the language "except to the extent" is designed to link the remaining prefatory language in (c)(1)(A) to the other subdivisions.

As did the Alaniz court, this Court also believes that the "any other provision of law" language provides a safety valve that would preserve the applicability of any other provisions that would impose an even greater mandatory minimum consecutive sentence for a violation 924(c).

This Court does not believe that Congress intended to narrow the 924 provision by eliminating mandatory consecutive sentences where another provision imposes a higher mandatory minimum sentence for conduct other than provided for in 924(c), and the Court finds no ambiguity whatever.

Interestingly, in Alaniz, the court said, quote, even if we found the statute ambiguous, however, we would reach the [17] same conclusion about its intended meaning. The district court's interpretation which deems the amendment's mention of a "greater minimum sentence" to refer to a sentence for the predicate crime fails to give the statute a sensible construction. That construction would punish those guilty of severe offenses more leniently and those guilty of less severe offenses more stringently, an illogical result. The most serious drug crimes and

crimes of violence, paren, those already carrying mandatory minimum sentences, close paren, would not be enhanced by a consecutive firearm sentence despite the fact that a gun was involved. Meanwhile, less serious crimes, paren, to which no minimum mandatory sentence applied, close paren, would be enhanced by a consecutive firearm sentence when committed with a gun, close quote.

The Alaniz court is right. Clearly Congress didn't intend such an illogical result. And similarly, in its decision in U.S. v. Baldwin, the Sixth Circuit has said, quote, we have scoured the statutory language; yet we find no support for the proposition that Subdivision (c)(1)(A)'s "greater minimum sentence" clause applies to the predicate drug-trafficking crime or crime of violence of which a particular defendant has been convicted. Subdivision (c)(1)(A)'s "greater minimum sentence" clause refers only to the firearm-related conduct proscribed by either a 924(c)(1) or by other provision of law.

[18] The ten-year mandatory minimum sentence at 21 U.S.C. 841(b)(1)(A) does not govern firearm-related conduct and, therefore, does not fall within the Subdivision (c)(1)(A)'s reference to any other provision of law, close quote, internal quotations and citations omitted, Alaniz, 235 F.3d at 389.

Although I have no guidance presently from the Tenth Circuit Court of Appeals – it may be the case that the court will choose to use this case as an opportunity to give trial judges guidance; but it's my

view that our circuit will likely follow the majority of circuits that have ruled on this issue.

For the foregoing reasons, the Court finds that the probation department's recommendations contained in the presentence investigation report properly calculate the 924(c) provision and the resulting statutory sentence of not less than five years consecutive to the underlying predicate offense of ten years obtained by statute in Count One.

Mr. Pretty, there are a number of other objections that you raised. Were you satisfied by the responses of the probation department with respect to those objections?

MR. PRETTY: No, Your Honor. The only one that I – I find is my objection on page 3, Paragraph 15. I believe that the whole scheme of mandatory minimum sentences violates the Sentencing Reform Act, and it is a violation of the separation of powers doctrine. And so for that reason I believe that this [19] Court should not impose a mandatory minimum but should instead impose, A, a sentence based upon the Sentencing Reform Act; and then, secondly, we should get a variance based upon the factors as set forth in my objections to the presentence report.

THE COURT: The Court does not agree with your argument, however troubled I am by Congress' exercise of its lawful authority, and the Court simply cannot accept your argument in this matter.

Does that resolve all substantive issues?

MR. PRETTY: Yes, Your Honor, and needless to say, to preserve it on appeal, we would object to the substantive – the rulings on the substantive issues you made and also your rulings on the procedural issues.

THE COURT: I expect that you will appeal them, and I would hope that you would do so if you think I am in error.

For the foregoing reasons, the Court will accept the recommendations of the probation department and determine that the offense level – that the total offense level here is 32. The criminal history category is "I." Unfortunately for Ms. Villa Count One requires a guideline range of 121 to 151 months. A sentence of not less than ten years is required by law. Count Two mandates a consecutive sentence of 60 months to be imposed in addition to the sentence imposed in Count One.

The defendant is ineligible for probation. A term of supervised release of five years is authorized on Count One, [20] three to five years on Count Two, a fine of 17,500 to four million is authorized on Count One. Statutory penalty of up to 250,000 is authorized on Count Two. The Court notes the defendant's inability to pay such fines. Restitution is not an issue here. A hundred-dollar special assessment per count totaling $200 is required by law.

Does the United States wish to object?

MR. KUBICHEK: We do not, Your Honor.

THE COURT: Any additional objections, Mr. Pretty?

MR. PRETTY: Your Honor, I would again object; that I believe that the Court's calculation of the guidelines is both procedurally incorrect and substantively incorrect and would again move for a probationary sentence.

THE COURT: All right.

Ms. Villa, you have a right to speak before I impose a sentence. If you'd like to exercise your right to speak, please come to the podium with your lawyer.

(Defendant complies)

THE DEFENDANT: Your Honor, first of all, I would like to excuse myself 'cause I don't know how to express myself first of all.

I do want to let you know that I am guilt- – I am innocent of these charges. I also do want to let you know that I want to be as closest (sic) to my children as I could be. My mom is the one that has both of my kids at this time. She does [21] have a lot of health issues. So I know that there's a place in California in Dublin that we've been searching (sic) that's like about two hours' drive from my mother.

And my husband also is willing to go – to go visit me with my children on our visitation days as – so I can help my mom in guidance. And if I'm not gonna be there physically for a while, I can be there in

visitations and be able to help my mom support both of my children.

I do have an eight-year-old who is – has ADHD, and I have a 16-year-old daughter also, and she's attending a Catholic school. So I would like to be able to be as best of a mother as I could be.

Also I do wanna let you know that while the time I have been incarcerated, I have taken self-help classes. I am als- – I also have studied a lot of the Bible issues, and I've got certificates for those as well.

And I did not know that alcohol – alcohol is an addiction. So throughout this whole procedure and the time that I've been researching the self-helps and the Bible studies, it had me understand that alcohol is an addiction, and, I do understand that I am addicted to alcohol.

And when I was in bond, I did go to some AA classes. And when I was incarcerated, like I said, I took like alcohol programs, and I got certificates for those. So if I do have to end up doing time, I wanna take all the classes that I can take [22] to prepare myself so when I am out there with my children I can financially support them and be a support and lead them in the right way, and that way they don't have any – they don't go in any bad directions for them to be facing what I'm facing at this point in time.

And I also want – wanted to let you know that we have been praying for you a lot so you can have

compassion, and you can see my background; that I – other than these charges, I've never been in trouble.

Also when I was in the – on bond, I did very good. I always called my pretrial services lady. She even knew my phone number by heart because she would say, "You know, like you call me for every little thing." But because I wanted to make sure I was following everything, I would call her. I also would call Wyoming with Phil, and we didn't – if I couldn't get ahold of Becky.

So like I did move three times in that time, and that was one of my things; that I had to let them know when I moved. So for every question that I had and when I did have problems with my brother or my husband coming to my apartment with alcohol, I would call Becky and let them know that I was having a problem so she can get them out of there and let them understand that I cannot, you know, have any alcohol in my house. So I did everything I can to make sure that I did not break any of my bond reglaments (sic) – or conditions, I [23] should say. So once again I would like you to have compassion and look at my past. And also when I was out on bond, that I did very good on that. That's all I have to say.

THE COURT: All right, ma'am.

United States?

MR. KUBICHEK: Nothing for the United States, Your Honor.

THE COURT: Anything else, Mr. Pretty?

MR. PRETTY: No, Your Honor. I would again move for a downward variance based upon what my client said. She was out on bond for an extended period of time. She did not violate any of the terms or conditions of bond. My client – she is a first offender. The facts as to the gun charge was the fact that somebody had put the weapon in there and that this is, you know, clearly – I am going just based upon the testimony of the government's witness. Somebody had put the weapon in there without either one of the young ladies' knowledge. They – they found the weapon. The weapon probably should have been immediately discarded in the garbage can at that point in time.

However, the parties were driving along and were gonna discard it along the side of the road; and before they could discard the weapon, it was found by the – they were stopped for speeding.

So, Your Honor, again we would say that there's a – there is sufficient grounds for a downward variance. We find [24] that the sentencing guidelines – or excuse me – that the mandatory minimums are unconstitutional. And we respectfully take exception to your following the – what three of the other courts have found instead of following the law as set forth under Whitley and what Congress intended when it passed its law. Thank you, Your Honor.

THE COURT: In light of the Court's comments on the record, does the United States wish to object to the Court's decision to vary from the

121-month sentence to a sentence of 120 months as to Count One?

MR. KUBICHEK: No, Your Honor.

THE COURT: I'll impose the sentence that you'll have to serve now, Ms. Villa. Of course, we'll talk about your right to appeal both the underlying conviction – you have a right to appeal that, any perceived errors, any rulings by this Court with regard to suppression and as well the sentence I have just imposed, and I'll talk to you about the importance of doing that in a timely fashion.

What's really lamentable about your circumstance is that as a human being you showed potential. Your big problem is the men you consort with. They've brought you to this day. It's their fault primarily that you're here. I know that. You don't want to blame them but I do.

I don't think you fully appreciated the consequences of what you were doing, and now the consequences of your deeds [25] have an impact far greater than I think is necessary. These are the consequences of your decisions. My hope is that during your period of incarceration you'll reflect on how you allowed others to bring you to this point in your life; that you'll reflect upon the great suffering that it causes your children, and you'll set a new course for your life when you're discharged from prison.

I'll announce the sentence I'm going to impose, ma'am. I'll give your lawyer and the United States an

opportunity to respond further before I impose it. Please listen carefully.

Pursuant to the Sentencing Reform Act of 1984 and considering the mandatory minimums imposed in this matter, it is the judgment of this Court that the defendant, Josefina Villa, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months as to Count One and 60 months as to Count Two to run consecutive to Count One.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years as to Counts One and Two to run concurrently. While on supervised release, the defendant shall comply with the following conditions:

She shall not commit any crimes, federal, state or local. She shall abide by the standard conditions of supervised release recommended by the sentencing commission.

[26] She shall not purchase, possess or use firearms, ammunition or explosives. Revocation of supervised release is mandatory for possession of a firearm.

The defendant shall not illegally use or possess a controlled substance. Revocation of supervised release is mandatory for possession of a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least

two periodic drug tests thereafter as directed by her supervising probation officer.

Pursuant to Public Law 108-405, revised DNA collection requirements under the Justice for All Act of 2004, the defendant shall submit to DNA collection while she's incarcerated in the Bureau of Prisons or thereafter at the direction of her supervising probation officer.

The defendant shall make special assessment payments as ordered by the Court and is required to notify the Court, through the probation office, of any material change in her economic circumstances which would affect her ability to meet her monetary obligations.

Special terms of supervision apply.

The defendant shall participate in a program approved by the United States Probation Office for substance abuse treatment which may include testing to determine whether she has reverted to the use of a controlled substance.

[27] The defendant shall refrain from the use or possession of alcohol and is prohibited from entering any establishment whose chief source of income is derived from the sale of alcohol.

As a component of the treatment – the defendant's treatment and testing program, the defendant shall pay a one-time fee of $250 to partially defray the cost of treatment and/or drug testing. Monetary payments made by the defendant shall be applied to

this fee only after all other court-ordered monetary obligations have been met.

The defendant shall be provided a coupon book for making her payments by the probation department. Payments will be made, by cashier's check or money order, to the Clerk of the U.S. District Court at the address identified in the judgment.

This provision will be waived in the event the defendant is supervised in a district other than the District of Wyoming.

The defendant shall obtain a mental health evaluation and participate in mental health counseling until such time as she is released from counseling by her probation officer and mental health treatment provider.

The defendant shall submit her person, residence, office or vehicle to a search conducted at a reasonable time and in a reasonable manner based upon a reasonable suspicion of the presence of contraband or of another violation of a term of [28] supervised release. The defendant shall warn all other residents of her dwelling it is subject to search pursuant to this condition.

The failure to submit to such a search when required to do so will be seen by the Court as a material violation of supervision.

The Court finds the defendant does not have the ability to pay a fine as established by the guidelines. No fine is ordered.

The defendant shall pay a special assessment fee in the amount of $200 due immediately.

She shall participate in the Bureau of Prisons Inmate Financial Responsibility Program in order to pay her special assessment. Amounts not paid immediately or while she's incarcerated shall be paid in monthly installments of not less than $25 beginning 60 days after her release from incarceration.

Again, monetary payments shall be made to the Clerk of the U.S. District Court at the address identified in the judgment.

Does the United States wish to object to the proposed sentence?

MR. KUBICHEK: We do not, Your Honor.

THE COURT: Counsel?

MR. PRETTY: Yes, Your Honor. I would again renew my [29] substantive and procedural calculations pursuant to the various laws of the United States.

In addition, Your Honor, one thing we did not talk about is the RDAP program, R-D-A-P. It's my understanding that she is ineligible for the RDAP program based upon the fact that she was convicted of a gun offense.

However, if by some reason that the Bureau of Prisons changes its policy, I would respectfully request that the Court recommend that she go to the RDAP program.

THE COURT: Yeah. I'll strongly recommend she be considered for the 500-hour RDAP program. It makes no sense to me that there would be a distinction made between those who have guns and those who don't have guns.

MR. PRETTY: But as the Court knows, there is that distinction.

THE COURT: Yeah, well –

MR. PRETTY: But I wanted to –

THE COURT: One of the many illogical distinctions that I find in this job; but be that as it may, it is what it is. I'll strongly urge the Bureau of Prisons, if the policies change, that she be allowed to participate in the program. She's the kind of person the program was designed to assist.

I'll ask that she be considered for placement at a facility in Dublin, California, or another place in California that is close to her family.

[30] That sentence is now imposed upon you, ma'am. If you wish to exercise your right of appeal, you may do so by filing a notice of appeal within ten days of the date I sign the judgment. The judgment in this matter will likely be signed tomorrow. If you have not filed that notice of appeal within that ten-day period, you will have waived your right of direct appeal. So for further information regarding your right of appeal, please speak with your lawyer immediately upon the conclusion of this hearing.

MR. PRETTY: Your Honor, as this Court knows, I filed a motion. I was retained by the family. The family's funds have expired. Your Honor, I would respectfully request when I file the motion, I file the affidavit, that she be allowed to proceed in forma pauperis, and I would like to be appointed to represent her on in forma pauperis, Your Honor. I don't think there's anybody that has more commitment to this case than I do.

THE COURT: I will have – I need to see an updated affidavit. If indeed it appears that she is unable to pay for her own resources, I will consider your motion.

MR. PRETTY: Your Honor, we filed an updated affidavit less than a month ago.

THE COURT: I haven't seen it.

MR. PRETTY: May I approach the bench, Your Honor?

THE COURT: You may.

[31] (Document handed to the Court.)

(The Court and the clerk confer sotto voce.)

THE COURT: Apparently there was an order already entered electronically.

MR. PRETTY: Okay. I have not gotten it, Your Honor. I apologize.

LAW CLERK OERTLE: It was – it was granted on October 27th.

THE COURT: It was an electronically entered order.

All right. Anything else, counsel?

MR. PRETTY: No, Your Honor. And thank you for taking the – I realize you have a jury waiting, Your Honor, and we do appreciate you taking the time necessary. And even though we feel your rulings are improper, we do believe that – we appreciate the time and patience you put to this case.

THE COURT: Josefina C. Villa, I remand you to the custody of the Attorney General of the United States for the service of your sentence. Good luck to you, ma'am.

THE DEFENDANT: Thank you.

THE CLERK: All rise.

MR. PRETTY: Your Honor, may Mr. Kubichek and I come back and talk to you for a second?

THE COURT: I'm not going to do a sentencing. I know what you want to talk to me about. I'm not going to do a sentencing by video, counsel. We'll have to reschedule –

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**CASE NO. 07-CR-36-WFD**
VS.	)	
JOSEFINA C. VILLA and ANGELINA M. DAVIS, aka Angela M. Davis,	)	**August 29, 2007 Casper, Wyoming**
Defendants.	)	

TRANSCRIPT OF TELEPHONIC ORAL RULING ON DEFENDANTS' MOTIONS TO SUPPRESS BEFORE THE HONORABLE WILLIAM F. DOWNES CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

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U.S. District Courthouse
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Proceedings/transcript produced via stenography/CAT system.

[2] THE COURT: Good afternoon, counsel – or good morning.

MR. PRETTY: Good morning, Your Honor.

THE COURT: We're on the record in United States versus Villa and Davis in Civil 2000 – excuse me – Criminal 2007-CR-36-D on motions for – ruling on the pending motion for summary – excuse me – motion to suppress.

The Court has reviewed the tape, the DVD that was submitted by the parties at the time of the argument.

The Court will deny the motions to suppress. In reviewing the tape, the Court is struck by a number of factors. First of all, the first prong of the *Terry* test has been established. It's clear that Ms. Villa was

speeding. She was clocked at 79 miles an hour. There was a reason to stop her for that traffic violation.

Trooper McKay – his questioning of Ms. Villa was proper, that is, regarding her travel plans. There were differences in her address, the vehicle registration which was identified at the time he called in for information. All of that is clear on the DVD incidentally.

He wrote her a warning, and there's – there's no question that the warnings – the warning ticket cannot be said to have prolonged the stop. To the contrary, it was – it was pretty efficiently done.

[3] I saw no reason why Trooper McKay could not continue his discussion with Ms. Villa after he gave her the warning ticket, and she clearly consented to further questions. So the Court is of the opinion that Ms. Villa's claims that the stop and the brief detention which followed were unlawful – the Court is of the opinion that those – those assertions are without merit.

It's – it's difficult to determine whether there was any question about the search of the vehicle. It appears that the focus was on the initial stop and the basis that led up to the search; but to the extent that either party has, at least subliminally, referenced the search itself, it's clear that – from listening to the tape, that Trooper McKay's discussions with Ms. Davis after he detained Villa only confirmed the suspicions he had about whether or not Ms. Villa had been lying about involvement in criminal activity.

There was much confusion about their – their travel plans, who they were going to visit, why they were going there; Ms. Davis saying that she, quote, only, quote, kind of knows them, close quote, that is, the family she was visiting. When asked about how well she knew Villa, she makes the comment, "Well, we just barely hang around a little bit." You know, she's crossing the United States on the interstates, and she barely hangs around a little bit. [4] That didn't ring true for the Court, and it obviously didn't ring true for Trooper *McKay*.

There was no consent to a search; but certainly in the assessment of the Court, having reviewed the tape, there was probable cause for the search. It was reasonable for him under the circumstances, given the discrepancies and stories between these two women that a K-9 unit was called. As we know from watching the tape, the dog did alert on the vehicle almost immediately, and it was a fairly short search by the K-9. Seems to be, in the Court's assessment, reasonable under all the circumstances.

The K-9 certainly did alert, and that's apparent to the Court. It was – in fact, it's one of the more textbook examples of the dog alerting on the right side of that vehicle. Granted the contraband was found more on the left side, but clearly there was probable cause for the troopers to search Ms. Villa's car at that time.

Regarding the statements that Ms. Villa made prior to her formal detention, they were made during

the course of the traffic stop; and so any suggestion that a *Miranda* warning was required is – is misplaced. In any event, she was eventually given her *Miranda* rights and signed a formal waiver of her rights for further questioning after apprehension. The Court would not certainly rely on nervousness itself. I know the United States made something [5] of nervousness of the parties in question, but that – the Court won't look at that in isolation. The Court will consider the assessment of the officers in light of all the other factors that they took into account, most notably and most tellingly, frankly, the rather strange and convoluted explanations by both of these women as to where they were going and what they were doing. It didn't ring true to the officers and certainly doesn't ring true to the Court. The motions to suppress are denied.

When would the parties be ready to go to trial in this case?

MR. HEALY: The government would be ready immediately, Your Honor.

THE COURT: Mr. Blythe, how do you feel?

MR. HEALY: We've got – I'm just trying to look at the – at the calendar. I don't know what – what Mr. Blythe and Mr. Pretty think about a conditional plea at this point; but, you know, if I had a couple of weeks to get my witnesses together, September 10th would – well, as it's – it wouldn't be a long trial, but I need to – I'm supposed to present at

the bar – at the state bar on September 13th. So maybe – we have grand jury September 17th.

THE COURT: Let me hear from defense counsel.

MR. BLYTHE: September 17th should be okay. I – I [6] would anticipate, if you wanna stack it, we'd probably have a conditional plea. That at least is the thought I have at the moment.

Mr. Pretty?

MR. BLYTHE: So I – I would be surprised if – if we actually did pick a jury.

THE COURT: Mr. Pretty?

MR. PRETTY: Other than the fact that I have plans that have been paid for and set up for eight months to leave the 11th of September and come back – I think it's the 3rd or 4th of October. I – I'm free after – after October.

THE COURT: All right. Look, why don't you gentlemen converse with one another, come up with a date that you can agree to, and we wanna get this matter before a jury as quickly as possible.

MR. PRETTY: Your Honor, how soon will we have a written – written opinion?

THE COURT: You just got the opinion. I gave an oral ruling.

MR. PRETTY: I – I know that, Your Honor, but I would like to send a copy to my client so I can make recommendations to her.

THE COURT: You can get a transcript sometime this week from –

MR. PRETTY: All right.

[7] THE COURT: – the clerk (sic). You can make those arrangements from –

MR. PRETTY: Jamie, can you do that for me?

THE REPORTER: Certainly, counsel. It's very short. So I'll do it for you in the next day or so.

MR. PRETTY: Thank you, ma'am.

MR. HEALY: Well, Judge, I think if you hang up, we'll still – the three of us will still be on, and – and we can – are you guys okay with that? Can we talk?

MR. BLYTHE: Oh – oh, sure, and October 8 is fine with me.

MR. HEALY: Okay. We – otherwise we're gonna need –

MR. BLYTHE: But I anticipate a conditional plea.

MR. HEALY: Okay. All right.

MR. BLYTHE: I anticipate a conditional plea.

THE COURT: All right. Well, we – we need to get a trial date. What happened here is I think, Ron, you requested a continuance. So we didn't follow up with another trial date which frankly should have happened, and there was no trial date on this case. So we need to get one now, and we need to get one we will keep, and I'll prioritize it on the criminal docket. So if you can't, for whatever reason, come to terms on a plea, that's – that's fine, but I will have a firm trial date for you when you [8] give us this date. It'll take priority on other matters. Now, you're gonna have to call and speak with my new judicial assistant, Ms. Blonigen, and –

MR. PRETTY: Isn't Karen there with you anymore, Your Honor?

THE COURT: Karen retires tomorrow.

MR. PRETTY: Well, Judge, if you wouldn't work her so gol' darn hard.

THE COURT: Well –

MR. HEALY: Bad day for the Court, Your Honor.

THE COURT: Yeah. I think she's tired of you guys. I'm sure she's not tired of me, but I'm sure she's tired of you guys.

(Laughter)

MR. PRETTY: That's what I said, 'cause you work her so hard.

THE COURT: Yeah, well, she deserves her retirement. But in any event, call –

MR. PRETTY: I'm sure she does, Your Honor. I'm just giving you a hard time. You know that.

THE COURT: Call Ms. Blonigen and she will confirm the dates that I have available on the docket.

MR. HEALY: Is – is Ms. Blonigen in this afternoon, Your Honor?

THE COURT: Yes, she is.

[9] MR. HEALY: Okay. We'll do this right away then.

THE COURT: All right.

MR. PRETTY: Is Ms. Blonigen Mike's wife?

THE COURT: Yes.

MR. PRETTY: Oh, okay.

THE COURT: Yeah. All right. Thank you to all of you.

MR. PRETTY: All right.

MR. HEALY: Thank you, Judge.

THE COURT: Good morning.

(END OF PROCEEDINGS)

* * *

APPENDIX E

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**No. 07-CR-36-D**
JOSEFINA C. VILLA,	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT VILLA'S MOTION TO SUPPRESS

The United States, by and through its attorney, Stuart S. Healy, III, Assistant United States Attorney for the District of Wyoming, respectfully submits the following as its response to the Defendant's Motion to Suppress evidence obtained from her vehicle.

I. INTRODUCTION

The Defendant, Josefina C. Villa, has moved to suppress the evidence seized from her vehicle during a traffic stop. The Defendant contends generally that the stop was unlawful, the search was unlawful and her subsequent detention was unlawful, all contrary to the Fourth Amendment to the United States Constitution. The Defendant further moved to suppress any statements made by her to law enforcement.

The United States submits that the stop and detention of the Defendant were reasonable under the Fourth Amendment. Trooper McKay was justified in making the stop because the Defendant was traveling 79 miles per hour (mph) in a 75 mph speed zone. The detention was reasonable because the Defendant consented to further contact with Trooper McKay. In any event, without the Defendant's clear and unequivocal consent, Trooper McKay had developed reasonable suspicion to detain the Defendant. Thus, this Court should deny the Defendant's motion to suppress.

II. FACTS

On December 6, 2006, at about 7:40 a.m., Troopers McKay, Peech and Wilson were observing traffic in the median at approximately mile post 365 on Interstate 80. Trooper Wilson observed a vehicle traveling at a high rate of speed, unlocked his radar and clocked the vehicle traveling at 79 mph. As the

vehicle sped by the troopers, Trooper McKay noticed the driver slamming on the brakes to lower the vehicle's speed. Trooper McKay locked his radar onto the vehicle at that time and clocked it at 72 mph. Trooper McKay activated his overhead lights, and the vehicle eventually stopped at mile post 368. As Trooper McKay approached the vehicle on the passenger side, he saw two females inside. He explained to the driver that he had stopped her for traveling 79 mph in a 75 mph zone. She claimed that she had set her cruise at 75 mph.

Trooper McKay asked the driver for her driver's license, vehicle registration and proof of insurance. While Trooper McKay was waiting for the driver to retrieve the requested information, he noticed: (1) both occupants looked tired; (2) multiple cell phones in the center console (two pink ones); (3) luggage in the back seat rather than the trunk; (4) the driver seemed extremely nervous, while the passenger was overly friendly. When the driver handed the requested documentation to Trooper McKay, he noticed her hand was shaking nervously. The driver was identified as the Defendant Villa (hereafter "Villa"). Trooper McKay asked Villa and the passenger where they were going, and both replied they were going to Minnesota. The passenger, later identified as Defendant Davis (hereafter "Davis"), stated they were going to visit family.

After retrieving the requested information, Trooper McKay returned to his patrol car. While checking the driver's license, registration and proof of

insurance, Trooper McKay noted that the vehicle had Nevada license plates and a Nevada registration. However, the registered owner, Villa, had an address of Citrus Heights, California. The address on the insurance document was from Reno, Nevada. He also noted that the Nevada registration and Nevada insurance were both purchased on November 21, 2006. Trooper Peech had arrived at the scene as backup. When he saw the registration and insurance, he agreed that Trooper McKay should look more closely into the dates and addresses. Trooper Peech then left the scene.

At approximately 7:46 a.m., Trooper McKay approached the driver's side of the vehicle and asked Villa to return to his vehicle with him in order to clear up his confusion regarding the different addresses. In the patrol car, Trooper McKay asked Villa if she lived in Nevada because the license plates and vehicle were registered in Nevada. Villa explained that she lived in California but that her boyfriend lived in Nevada. Trooper McKay asked Villa where she was going. Villa said they were going to Minnesota, but that she did not know where in Minnesota. She explained that Davis knew where they were going. Trooper McKay then asked Villa if she and Davis were related. Villa replied that Davis was her brother's (Villa) girlfriend.

Following this preliminary discussion, Trooper McKay explained to Villa that he was issuing her a warning for the traffic violation. As Trooper McKay was completing the warning ticket, Villa continued to

speak with Trooper McKay, but stammered her words and acted nervous when saying: "I thought you could go 10, like under 10 miles, I mean over ten, like under ten miles over the speed limit." Trooper McKay explained that 75 mph, meant 75 mph. He told Villa that she seemed nervous. Villa stated that she was always nervous when getting pulled over. Trooper McKay returned the registration, driver's license and proof of insurance to Villa, and told her that she was free to go. As Villa was exiting the vehicle, Trooper McKay asked if he could ask a few more questions. Villa consented.

Trooper McKay again asked where in Minnesota Villa and Davis were going. Villa explained that they were going to Davis' family's house, that she did know the city, but could not remember it because she just woke up. When asked how long she would be in Minnesota, Villa replied that she would be there a couple of days. Trooper McKay observed that they were traveling long way (from California to Minnesota) just for a couple of days. Villa then stated that she was not sure how long she would be there, that Davis was going to stay, and that she (Villa) might fly back. When Trooper McKay tried to clarify that Villa might fly back, apparently leaving her newly purchased car in Minnesota, Villa again changed her story and replied that she did not know what she was going to do, and that she had "kind of left her husband." Trooper McKay pointed out that Villa had earlier told him she had a boyfriend, not a husband, Villa said, "that's why I left my husband."

At this point, based on what he had observed, including all of the inconsistencies and discrepancies in Villa's story, Trooper McKay asked Villa to wait while he spoke with the passenger, Davis.[1] Trooper McKay then approached Davis and asked her if he could ask some questions. Davis agreed. However, as Trooper McKay was approaching the passenger side of the vehicle, Villa followed him. Trooper McKay has to ask Villa to stand back while he spoke with Davis.

Trooper McKay asked Davis whose family they were going to visit. Davis said that they were visiting Villa's and Davis' family, and that she "kind of knew them." Davis was unsure how long she would be there, that she might come back early, and if she did come back early she would fly. Trooper McKay asked Davis whose car they were in, and Davis indicated it was Villa's boyfriend's vehicle. Trooper McKay then asked Davis how well she and Villa knew each other. Davis replied, "About as well as most families, we just barely hang around a little bit."

After this brief discussion with Davis, at approximately 7:53 a.m., Trooper McKay again approached

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[1] The government acknowledges that when Trooper McKay asked Villa to wait while he spoke to the passenger, Villa was effectively detained. Usually, the analysis would start and stop there. However, based upon the broad and imprecise brush strokes applied by Villa in her Motion to Suppress, without pointing to any actual facts to support her claims, it is necessary to further develop the facts relating to the stop, Villa's arrest, and statements made by Villa after her arrest.

Villa and asked Villa if there was anything in the vehicle he should know about – marijuana, heroin, or cocaine. Villa indicated there was nothing like that in the vehicle. Trooper McKay asked for consent to search the vehicle. Villa told him he would need a search warrant and refused to consent to the search. Trooper McKay then explained that since Villa's and Davis's stories did not match, he was going to call for a canine to run around the vehicle. Trooper McKay requested the canine shortly thereafter.

At approximately 8:06 a.m., Trooper Dave Chatfield arrived with his canine. Trooper Peech had also returned to the scene. Less than a minute after the dog began the search, it alerted to the passenger side of the vehicle. After the dog alerted to the presence of drugs, the occupants were patted for weapons and placed in Trooper McKay's patrol vehicle. Because the dog alerted, Troopers McKay, Peech and Chatfield began searching the vehicle. At approximately 8:14 a.m. (approximately 32 minutes into the stop), Trooper Peech retrieved two packages of suspected methamphetamine from behind the driver's seat in the firewall/side panel of the vehicle. Both Villa and Davis were arrested for possession of a controlled substance.

The packages seized from the vehicle were later field tested. One package tested positive for methamphetamine. The other did not. Each package weighed approximately 2 pounds.

Shortly after her arrest, Officer Murray of the Cheyenne Police Department interviewed Villa at the Drug Enforcement Administration building in Cheyenne, Wyoming. He advised Villa of her rights per *Miranda*. Villa acknowledged her rights and agreed to speak with Officer Murray. Villa told officers that she and her husband were divorced, and that she was currently unemployed. When asked how she supported herself, she said that she and her husband received approximately $69,000 in excess funds from a foreclosure on their home. Villa further told officers that the vehicle was registered in her name, but that it actually belonged to her boyfriend. It was registered to her because her boyfriend had "problems" with his ex-girlfriend and wished to have it registered in this manner. Villa also said that her brother was dating Davis and he had asked Villa to accompany Davis to Minnesota where she would visit her family. Villa could not remember the name of the town in Minnesota that was their destination. Villa further related that her (Villa's) boyfriend had delivered the vehicle to her at her apartment the night before she and Davis left. Villa's brother brought Davis to the apartment prior to their departure.

III. DISCUSSION

Villa has moved to suppress the evidence in this case for the following generalized reasons: (1) because she was stopped without reasonable suspicion or probable cause; (2) because during the stop she was

unlawfully seized in violation of the Fourth Amendment to the United States Constitution; (3) that the search of the vehicle was conducted without reasonable suspicion; (4) and that she was detained unlawfully, and, therefore, the statements she gave were obtained in violation of her constitutional rights. The United States contends that there was ample reasonable suspicion to make the stop in the first place, reasonable suspicion to briefly detain Villa, and, after the K-9 alert, probable cause existed to conduct the search. Finally, the statements that Trooper McKay obtained from Villa during the stop were obtained lawfully and/or consensually. Any statements made by Villa to Officer Murray came only after he advised her of her *Miranda* rights and she acknowledged and waived those rights.

A. The Stop

Villa contests the validity of the stop without explaining why, although she acknowledges that the initial reason for the stop was an allegation of speeding. Trooper McKay stopped Villa for traveling 79 miles per hour in a 75 mile per hour zone, a violation of Wyoming Statute § 31-5-301(b)(iii). In the Tenth Circuit, a routine traffic stop constitutes an investigative detention or seizure that invokes the protections of the Fourth Amendment and is examined under the principles established in *Terry v. Ohio*, 392 U.S. 1 (1968). *United States v. Williams*, 403 F.3d 1203, 1206 (10th Cir. 2005). Under the Fourth Amendment, the touchstone of the analysis is

always reasonableness in light of all of the circumstances. *United States v. Holt*, 264 F.3d 1215, 1220 (10th Cir. 2001) (*en banc*). Applying *Terry*, the reasonableness of a traffic stop is examined by a two part inquiry: first, whether the officer's action was justified at its inception; and second, whether the officer's action during the stop "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (*citing Terry*, 392 U.S. at 20); *United States v. DeGasso*, 369 F.3d 1139, 1143 (10th Cir. 2004).

1. The initial stop was lawful.

With regard to the first *Terry* inquiry, the validity of the initial stop: "a traffic stop is reasonable under the Fourth Amendment at its inception if the officer has either (1) probable cause to believe a traffic violation has occurred . . . or (2) a reasonable articulable suspicion that 'this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction.'" *DeGasso*, 369 F.3d at 1143 (*quoting United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir.1995) (*en banc*), *see also Whren v. United States*, 517 U.S. 806, 810 (1996) (holding that detention of a motorist supported by probable cause to believe the motorist committed a traffic violation is reasonable under the Fourth Amendment). The officer's subjective intentions and motivations are irrelevant. *Whren v. United States*, 517 U.S. at 813. Rather, the sole inquiry is whether the officer had a reasonable suspicion that

the particular driver violated any one of the many applicable traffic and equipment regulations of the jurisdiction. *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998); *United States v. Villa-Chaparro*, 115 F.3d 797, 801 (10th Cir. 1997); *United States v. Botero-Ospina*, 71 F.3d at 787. Thus, a traffic stop is justified if the officer observes a driver commit a traffic violation, even if the violation is a minor one. *United States v. Bustillos-Munoz*, 235 F.3d 505, 511-13 (10th Cir. 2000).

In this case, Trooper McKay, Trooper Peech and Trooper Wilson observed Villa speeding. Trooper Wilson actually clocked Villa driving at 79 mph in a 75 mph zone. Therefore, Trooper McKay lawfully stopped Villa for the speeding violation.

2. The initial detention prior to further consensual contact was lawful, and Villa's clear consent extended the initial detention.

The second *Terry* inquiry, whether the officer's action during the stop was reasonably related in scope to the circumstances which justified the interference in the first place, is also answered in the affirmative. Villa claims that she was "arrested" as soon as she exited her vehicle in violation of her Fourth Amendment rights and "applicable case law," without citing any case law, even though the law concerning routine traffic stops is well established. In any event, her claim is without merit. When an

officer observes a traffic violation, he may stop the vehicle, obtain the driver's license and vehicle registration, run a computer check on the car and the driver, and then issue a citation or warning, as appropriate. *United States v. Elliott*, 107 F.3d 810, 813 (10th Cir. 1997). With respect to the scope of the questioning after an initially lawful traffic stop, an officer may ask routine questions about the driver's travel plans. *United States v. Williams*, 271 F.3d 1262, 1267 (10th Cir. 2001) (collecting cases); *United States v. Hernandez*, 93 F.3d 1493, 1499 (10th Cir. 1996). Once the citation or warning is issued, and the computer check reveals no reason to further detain the driver or the vehicle, the driver must be given back her paperwork and allowed to proceed on her way unless the officer has developed reasonable, articulated suspicion of other crimes. *United States v. Hernandez*, 93 F.3d at 1498; *United States v. Sandoval*, 29 F.3d 537, 539-40 (10th Cir. 1994). On the other hand, a traffic stop may evolve into a consensual encounter if the officer returns the driver's license and vehicle papers, and then proceeds to ask further questions without further constraining the driver by an overbearing show of authority. *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000); *United States v. Werking*, 915 F.2d 1404, 1408-09 (10th Cir. 1990).

In this case, Trooper McKay received verification that Villa's driver's license was valid before asking Villa to return to his vehicle. However, he had not issued her a warning for speeding. Asking Villa to

return to his patrol car in order to do so was not unlawful. While in the patrol car, and as he prepared the warning ticket, Trooper McKay, knowing that Villa had a California driver's license and Nevada plates, asked Villa is [sic] she lived in Nevada since the vehicle was purchased in Nevada just two weeks earlier. Villa told Trooper McKay that she did not live in Nevada, that her boyfriend did, and that she had actually driven from California. Villa also repeated that she and Davis were traveling to Minnesota to visit Davis' family, but could not say exactly where they were going in Minnesota. Not only did Trooper McKay consider it unusual that Villa, the driver, did not know where in Minnesota she was driving to, Trooper McKay also recalled that when he initially approached Villa and Davis, Davis indicated that they, both of them, were going to visit family. Trooper McKay understood that to mean that Davis and Villa were related. Villa's statements, in addition to the statements made by Villa and Davis at his initial encounter, the nervousness displayed by Villa throughout, and the registration, insurance and license differences, made Trooper McKay suspicious that illegal activity was afoot.

However, even at this point, Trooper McKay did not seek an investigative detention. Rather, he gave Villa the warning ticket, and specifically told her that she was free to go. As she was leaving his vehicle he asked her clearly for her consent to continue asking

her questions, and she just as clearly gave it.[2] During the consensual encounter, Villa's answers to Trooper McKay's questions became even more confusing. For instance, Trooper McKay again tried to clarify Villa's destination in Minnesota. Villa told Trooper McKay that it was actual [sic] Davis' family that they were going to visit, and that she, Villa, knew the name of the city but could not remember it because she just woke up. Villa then stated that she was going to Minnesota for a couple of days. Trooper McKay thought it was odd that Villa would drive all the way from California to Minnesota for a two day visit, and he said the same to Villa. Villa then stated that she did not know how long she would be there, but that she would probably fly back. Again, considering that Villa had just purchased the car two weeks earlier, Trooper McKay found it suspicious that she would then leave the car in Minnesota with her friend, Davis. Again, trying to clarify what Villa was telling him, Trooper McKay repeated Villa and said, "So you're going to be out there for a couple of days, and then you're going to fly back?" Villa, extremely nervous at this point, responded that she actually did not know what she was going to do and that she had just left her husband. When Trooper McKay pointed out that she had earlier discussed a boyfriend, Villa quickly added that she left her husband because she had a boyfriend.

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[2] This critical point in the encounter occurs at 7:50:43 through 7:50:50 on the recording of the stop.

Here, reasonably certain that Villa was lying to him about her trip and the purpose for it, Trooper McKay asked her to wait while he spoke to Davis. There is no question that Villa was, at this time, under investigative detention because Trooper McKay had reasonable suspicion that Villa and/or Davis were involved in criminal activity.

3. Trooper McKay had reasonable suspicion to detain Villa while he spoke with Davis to clarify the travel plans.

When determining whether an officer has reasonable suspicion, the court should evaluate whether the totality of the circumstances before the detaining officer, viewed as a whole, support the conclusion that the officer has a "particularized and objective basis" for suspecting legal wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). While reliance on a mere "hunch" is insufficient to justify a detention, the likelihood of criminal activity need not rise to the level of probable cause, and may fall considerably short of a preponderance of the evidence. *Id.*, 534 U.S. at 274. Moreover, each factor relied upon to establish "reasonable suspicion" should not be viewed in isolation to determine whether, standing alone, it either is or is not consistent with innocent travel. *United States v. Mendez*, 118 F.3d 1426, 1431 (10th Cir. 1997). Such a "divide and conquer" approach is, as the Court noted in *Arvizu*, incompatible with the analysis dictated by *Terry v. Ohio*, 392 U.S. 1 (1968), and accords too little

deference to trained law enforcement officers' ability to "make inferences from and deductions about cumulative information available to them that 'might well elude an untrained person'." *Arvizu*, 534 U.S. at 273, *quoting United States v. Cortez*, 449 U.S. 411, 412-18 (1981).

In this case, there were several factors that provided Trooper McKay with a reasonable suspicion that criminal activity was afoot. Significantly, Villa gave vague and even contradictory travel explanations. For example, she purchased her car in Nevada, insuring it and registering it on the same day only two weeks prior to the stop. Next, some time within that two week period, Villa drove the car back to California and then decided to drive to Minnesota with Davis, without any clear idea of where she was going or how and when she would return. Certainly, Villa's confusing and unusual travel plans contributed to Trooper McKay's reasonable suspicion of criminal activity. *United States v. Kopp*, 45 F.3d 1450, 1454 (10th Cir. 1995) (implausible or unusual travel plans, combined with seemingly inconsistent answers about them, can contribute to reasonable suspicion); *Williams*, 271 F.3d at 1270 (even though explanation of travel plans may be facially plausible, officer's suspicions cannot be brushed aside when looking at other facts). Also, Villa displayed extreme and prolonged nervousness, nervousness especially pronounced as her story became more confusing. Admittedly, the Tenth Circuit has stated that nervousness is a minor factor to consider when

analyzing reasonable suspicion. However, the court still recognizes that excessive and atypical nervousness that does not abate during the stop is a factor that can contribute to reasonable suspicion. *See United States v. Williams*, 271 F.3d 1262, 1268-69 (10th Cir. 2001); *United States v. Bradford*, 423 F.3d 1149 (10th Cir. 2005); *United States v. West*, 219 F.3d 1171, 1178 (10th Cir. 2000).

Villa may argue that the factors named above may have an innocent explanation. However, *Terry* precludes this type of "divide-and-conquer analysis" of each of the officer's observations which may, "by itself be readily susceptible to an innocent explanation." *Id.*; *see also United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001) (analysis of whether an investigative detention is supported by an objectively reasonable suspicion of illegal activity turns on review of the totality of the circumstances). This court must give deference to Trooper McKay's ability to distinguish between innocent and suspicious actions, judging his conduct in light of common sense and ordinary human experience. *United States v. Williams*, 271 F.2d 1262, 1268 (10th Cir. 2001). In so doing, this court must find that Trooper McKay had reasonable suspicion to detain Villa.

Thus, *Terry*'s first prong is satisfied by probable cause that Villa was speeding. *Terry's* second prong was satisfied by Trooper McKay's proper questioning of Villa about her travel plans and the differences in her address and vehicle registration and insurance while writing her a warning ticket. Trooper McKay's

clarifying questions while filling out Villa's warning ticket did not prolong the stop. *See United States v. Wallace*, 429 F.3d 969, 974 (10th Cir. 2005) (finding that absent questioning that prolongs the stop, there is no Fourth Amendment issue with respect to the content of the questions). Trooper McKay could certainly continue his discussion with Villa after he gave her the warning ticket because she unequivocally consented to further questions. Therefore, Villa's claims that the initial stop and the brief detention that followed were unlawful are without merit.

B. The Search of the Vehicle

Trooper McKay's discussion with Davis after initially detaining Villa only confirmed his suspicions that Villa was lying to him and that Villa and/or Davis were involved in criminal activity. Many of Davis' answers to Trooper McKay's questions conflicted with what Villa told him. For instance, Davis said that she and Villa were going to visit *their* family, and that she, Davis, only "kind of knows them." Davis did not know how long she would be there, but that she, Davis, may come back early, and that if she did she would fly back. When asked how well she knew Villa, Davis said: "about as well as most families. We just barely hang around a little bit." The fact that Davis' statements contradicted almost every statement made by Villa prompted Trooper McKay to ask Villa if there were any drugs in the vehicle. When Villa denied there were, Trooper

McKay asked for consent to search the vehicle. Villa did not consent.

Consequently, just over 11 minutes into the stop, Trooper McKay told Villa that he had concerns about the stories that she and Davis were telling him, and that he would, therfore, be detaining her briefly while he asked for a K-9 to do a run around her vehicle. Approximately 13 minutes later, Trooper Chatfield arrived with the K-9. The dog alerted to the vehicle almost immediately. A 13 minute wait for a K-9, given all the circumstances, was reasonable. Longer waiting periods have withstood challenge. *See, e.g., Villa-Chapparro*, 115 F.3d at 802-03 (10th Cir. 1997) (extended detention of 38 minutes spent waiting for a drug-sniffing dog did not violate the 4th Amendment), *cert. denied*, 522 U.S. 926 (1997); *United States v. Cervine*, 169 F.Supp.2d 1204, 1215 (D. Kan. 2001) (finding that 20 to 30 minute wait for K-9 did not violate 4th Amendment); *United States v. Garcia*, 52 F.Supp.2d 1239 (D. Kan. 1999) (finding a delay of 40 minutes was not unreasonable when supported by reasonable suspicion, even when the driver was being detained against his will); *United States v. Alpert*, 816 F.2d 958 (4th Cir. 1987) (upholding 50 minute detention). *Cf. United States v. Borys*, 766 F.2d 304, 313 (7th Cir. 1985) (75-minute detention was "at the outer bounds of the Constitution"); *United States v. Place*, 462 U.S. 696, 709 (1983) (declining to adopt "outside time limitation" for permissible *Terry* stop, but admonishing that 90 minutes is probably too long for a *Terry* stop); *United States v. Sharpe*, 470 U.S.

675 (1985) (holding that in distinguishing a true investigative stop from a de facto arrest, the court must not adhere to "rigid time limitations" or "bright line rules" and rejecting 20 minute detention as being *per se* too long).

Of course, the K-9 alert to the outside of the car eliminated any doubt whatsoever concerning the presence of controlled substances in the car, and, despite Villa's claims to the contrary, provided probable cause for the troopers to search Villa's car. The Tenth Circuit has consistently held that probable cause can be based on an alert by a trained drug dog. *United States v. Morales-Zamora*, 914 F.2d 200, 202 (10th Cir. 1990) (dog sniff is not a search within the meaning of the 4th Amendment and therefore an individualized reasonable suspicion of drug related criminal activity is not required when the dog sniff is employed during a lawful seizure of the vehicle"); *United States v. Klinginsmith*, 25 F.3d 1507, 1510 (10th Cir. 1994) (drug dog alone provides probable cause); see also *United States v. Ross*, 456 U.S. 798, 809 (1982) (warrantless search of automobile is reasonable if officer has probable cause to believe it contains contraband).

C. Statements Made To Law Enforcement

Villa also asks the Court to suppress statements she made to law enforcement, presumably after her arrest, although it is not clear from her Motion. Whatever the case may be, statements made by Villa

prior to her formal detention were made during the course of a traffic stop, and thus did not require the officers to administer *Miranda* warnings to the Villa. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420 (1984) (a person subjected to a traffic stop is not "in custody" for purposes of *Miranda* unless his "freedom of action is curtailed to the degree associated with a formal arrest.")

On December 6, 2006, following her arrest, Villa was interviewed by Detective Jamey Murray of the Cheyenne Police Department at the offices of the Drug Enforcement Administration, Cheyenne, Wyoming. Prior to the interview, Villa was advised of her *Miranda* rights and signed a formal waiver of her rights. Villa then voluntarily made statements to the agents, statements that are, under the circumstances, clearly admissible against her at trial.

IV. CONCLUSION

For the foregoing reasons, the United States requests the Court to deny Villa's Motion to Suppress the evidence from the vehicle and any statements she made.

Respectfully submitted this 23rd day of April, 2007.

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